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No. 94-

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WINCHESTER HOMES, INC.,
Petitioner,

v.

HOOVER UNIVERSAL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This products liability action for damages arose out of Petitioner's purchase and subsequent installation of Respondents' defective fire retardant treated plywood into townhomes built by Petitioner, which were then subsequently sold by Petitioner to homeowners. In denying appellate review of this case, the Supreme Court of Virginia held that it was not reversible error for the trial court to wholly deny standing to Petitioner, both in its own right and as assignee of the homeowners, despite the existence of statutory authorization to bring such an action for damages under Virginia law.

In view of the foregoing, the following questions are presented in this petition:

(1) Is initial access to the courts in a civil case a fundamental right protected by the Due Process Clause of the Fourteenth Amendment to the Constitution?

(2) Did the trial court's refusal to recognize standing deprive Petitioner, in its own right and/or as assignee of the homeowners, of its recognized right of access to the courts to maintain a cause of action authorized by the state's legislature?

(3) If so, did the trial court's deprivation of Petitioner's right of access to the courts to maintain a cause of action authorized by the state legislature constitute a violation of a fundamental right so as to trigger a higher level of review of the state action under a substantive due process analysis?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The parties to the proceedings in the Supreme Court of Virginia were Winchester Homes, Inc. (as petitioner); and Hoover Universal, Inc., Johnson Controls, Inc., Ply Gem Industries, Inc., Reliance Wood Preserving, Inc., Mid-Atlantic Wood Preservers, Inc., Hoover Treated Wood Products, Inc., Allied Plywood Corporation, Jarvis Steel and Lumber Co., Inc., and McCoy Lumber Company (as respondents).

The Petitioner before this Court is Winchester Homes, Inc. Pursuant to Rule 29.1 of this Court, Petitioner states that the following are the names of its respective parent companies: Winchester Homes, Inc. is a wholly owned subsidiary of Weyerhaeuser Real Estate Company. Weyerhaeuser Real Estate Company is a wholly owned subsidiary of Weyerhaeuser Company. Winchester Homes, Inc. has no subsidiaries or affiliates.

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Winchester Homes, Inc., respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The two unreported decisions of the Supreme Court of Virginia appear at App. 1a and App. 2a. Likewise, the relevant unreported standing decisions of the Circuit Court of Fairfax County appear at App. 3a, App. 8a, and App. 19a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (1988). The decision of the Supreme Court of Virginia was rendered on March 2, 1994. (App. 1a). On April 15, 1994, a timely petition for reconsideration was denied. (App. 2a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. The Suit Below

On November 2, 1990, Winchester commenced this products liability lawsuit in its own right in the Circuit Court of Fairfax County, Virginia to recover its damages as a result of its purchase of the Respondents' defective products.

Winchester, a builder of residential homes, purchased Respondents' defective fire retardant treated plywood ("FRT plywood"), and before the defect became apparent, installed the FRT plywood into the roofs of over 1,300 Virginia townhomes. Thereafter, following the sale of the townhomes Winchester received reports of the degradation of the FRT plywood, threatening the structural integrity of the roofs and the safety of the homeowners.[1] Winchester inspected and replaced the defective FRT plywood to avoid potential injury (and the resulting liability) to the townhome owners as well as to protect its reputation as a builder. It seeks, as compensatory and consequential damages, the costs for the inspection and replacement of the defective FRT plywood.

The core issue in this case is standing, as a function of the due process right of access to the courts.[2] As a

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[1] Experts retained by Winchester determined that the FRT plywood was inherently defective due to the chemicals applied by the respondents to the plywood to make it fire retardant, thus causing the FRT plywood to prematurely degrade at an accelerated rate.

[2] Standing is concerned with the concept of a need to establish an entitlement to judicial action, separate from proof of the substantive merit of the claim advanced. Winchester's standing is

threshold matter, the trial court below held that Winchester had no right to present its claims for damages. During the initial pleading stage, the trial court erroneously ruled that Winchester lacked the requisite standing in its own right to sue Respondents for damages arising from the purchase of the defective goods. Ignoring the fact that the FRT plywood was admittedly "goods" at the time Winchester made its purchases, the court denied Winchester's standing solely because Winchester no longer owned the defective FRT plywood after it had been incorporated into the townhome roofs. Despite Winchester's absolute right to bring its case under Virginia's enactment of the Uniform Commercial Code, and pursuant to Winchester's right to protect its own business reputation, the court held that the owners of the townhomes with the defective FRT plywood, not Winchester, were the parties with the proper standing to sue Respondents. In an admittedly "unusual" judicial action, the court granted Winchester leave to amend certain counts, on the condition that it obtain written asignments of the homeowners'

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determined only by whether it "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 72 (1978). "The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.'" *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 484 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968)). "Standing is a threshold inquiry; it requires focus on the party seeking to have his complaint heard in a federal court; and it eschews evaluation of the merits. The court is not to consider the right or significance of the alleged injury, only whether it exists." *Coalition for Env't v. Volpe*, 504 F.2d 156, 168 (8th Cir. 1974). The Virginia Supreme Court has recognized that "standing to maintain an action is a preliminary jurisdictional issue having no relation to the substantive merits of an action." *Andrews v. American Health and Life Ins. Co.*, 236 Va. 221, 226, 372 S.E.2d 399, 402 (1988).

rights,[3] and thereafter structured the case as a breach of warranty case pursued by right of assignment.[4]

Winchester obtained the written assignment of rights from almost all of the 1300 Virginia homeowners in whose townhomes it had installed the Respondents' FRT plywood. Subsequently, Winchester, as assignee of the homeowners, prevailed against respondent Hoover Treated Wood Products, Inc. ("Hoover Treated")[5] at trial and was awarded damages by a jury in the amount of $434,185 for that Respondent's breach of express and implied warranties *to Winchester*. Shortly thereafter, however, the trial court entered judgment notwithstanding the verdict (JNOV) against Winchester on the grounds that Winchester also lacked the requisite standing to assert a valid cause of action as the assignee of the homeowners' rights. While noting that Virginia's anti-privity statute allowed UCC warranties to extend down the chain of distribution to a plaintiff whom might reasonably be affected by the goods, the court inexplicably turned its focus away from the purchases of the defective FRT plywood—the good which was the subject of the lawsuit—and to the purchase of the townhomes. The court erroneously concluded that the FRT plywood should now be deemed "realty" rather than "goods" because at the time of the lawsuit the FRT plywood was incorporated into the homeowners' roofs.[6]

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[3] *See* Transcript of Hearing, August 15, 1991, at 21-27. (App. 25a).

[4] Winchester's tort causes of action were dismissed on the grounds that "negligent design and manufacture is the manner in which the defendants allegedly breached these warranties," and its statutory claim pursuant to the Virginia Consumer Protection Act was also dismissed at the initial pleadings stage. (App. 3a).

[5] Over Winchester's objection, shortly prior to trial the trial court ordered that Winchester's case would be severed into separate trials for each defendant. For tactical reasons, Winchester chose to proceed first against Hoover Treated.

[6] This ruling in particular should be closely scrutinized in light of the specific type of good at issue. FRT plywood is a good spe-

The effect of the trial court's rulings regarding Winchester's standing is that no individual or entity has the ability to exercise the right to sue Respondents in the courts of the Commonwealth of Virginia for the damage caused by the defective FRT plywood. The paradoxical result is that no one, neither the purchaser of the goods nor the homeowners affected by those goods, has the most basic and fundamental right of access to the courts to seek a remedy for injury and damages caused by a good determined by a jury to be defective.

B. The Supreme Court of Virginia's Decisions

On March 2, 1994, the Supreme Court of Virginia summarily determined that none of the trial court's rulings, including those addressing Winchester's standing, were "reversible error", and accordingly refused to hear Winchester's appeal.[7] No explanation or reasoning was provided in the court's two sentence order; no opinion was issued. (App. 1a).

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cifically manufactured by Respondents for use by home builders for future incorporation into homes; and Respondents knew that is why Winchester bought it. If, as the trial court contends, the FRT plywood ceases to be a "good" upon its installation into the townhomes, then the court's two standing rulings effectively abrogate the warranty causes of action provided by the Virginia Legislature in the UCC and strip Winchester of all access to a judicial mechanism to advance such claims, because, under the court's analysis, the warranties afforded under Virginia law would not be enforceable by anyone—either the purchaser or the ultimate party affected by the good. Because neither the trial court nor the respondents demonstrated that the Virginia Legislature excluded the sale of FRT plywood (or any other good specifically designed for future incorporation into a dwelling) from the type of transactions the UCC warranties were designed to protect, such a result is inherently unjustifiable.

[7] Virginia has no automatic right of appeal in general civil cases such as Winchester's. The jurisdiction of the Virginia Court of Appeals is limited to administrative agency, domestic relations and workmen's compensation cases; other civil cases require the granting of a Petition by the Supreme Court of Virginia.

Thereafter, Winchester petitioned the Supreme Court of Virginia to reconsider its decision not to accept Winchester's appeal. In its Petition for Rehearing, however, Winchester relied almost exclusively on its standing arguments to persuade the supreme court to examine the admittedly "unusual" judicial actions taken by the lower court.[8] In demonstrating why the trial court's denial of its standing constituted reversible error, Winchester asserted that "the reversible error is so great as to violate Winchester's due process rights pursuant to Article I, Section 11 of the Constitution of Virginia and the 14th Amendment to the Constitution of the United States" because it was deprived of its—and the homeowners'—right to assert a cause of action authorized by the Virginia General Assembly. *See* Winchester's Petition for Rehearing, at 12. (App. 40a-41a). Moreover, Winchester specifically argued that the Supreme Court of Virginia's failure to find "reversible error" constituted an unconstitutional denial of Winchester's fundamental right of access to the courts.

> [The Virginia Supreme] Court is accepting the trial court's express rejection of the sole authority of the legislature to make the law of Virginia, and by doing so has denied Winchester's access to the court system. This access is guaranteed by the constitutions of Virginia and the United States and is a fundamental right, the denial of which must be recognized as reversible error.

Id. at 14. Nonetheless, on April 15, 1994, Winchester's petition to set aside the judgment and grant a rehearing was denied. (App. 2a).

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[8] As Winchester noted in its Petition for Rehearing, one of the primary reasons underlying its heavy reliance on the issue of standing was that the legal doctrine of standing establishes a threshold entitlement to judicial action, and hence, the other reversible errors "flowed" from the trial court's decision to deny Winchester standing despite a legislative mandate to the contrary. *See* Winchester's Petition for Rehearing, at 12 & n.4. (App. 40a-41a).

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW VIOLATE THE PROCEDURAL AND SUBSTANTIVE PROTECTIONS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE VIRGINIA COURTS HAVE DEPRIVED WINCHESTER OF ITS FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS TO MAINTAIN A CAUSE OF ACTION PROVIDED BY THE VIRGINIA LEGISLATURE.

A cause of action for damages is a property right and cannot be taken without due process. *In Re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 765 (3rd Cir.), *cert. denied sub nom., Chicago Title Inc. Co. v. Tucson Unified School Dist.*, 493 U.S. 821 (1989) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). And while a litigant is not entitled to any particular result, he or she is guaranteed the substantial right to redress by some effective procedure. *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). Here, because of the Virginia courts' denial of standing Winchester has been deprived of any procedure by which to proceed with its claim, a claim authorized by the Virginia General Assembly. The errors made by the state courts also translate into a substantive deprivation of Winchester's due process rights under the Fourteenth Amendment.

Throughout this case, standing has been and remains the core issue, for the trial court ruled at the beginning of the case that Winchester did not have standing in its own right as the purchaser of the defective FRT plywood, and, after the trial was over, that Winchester did not have the standing to sue Respondents as the assignee of the homeowners. This judicially-created standing rule has violated Winchester's constitutional rights because it has completely denied Winchester, in its own right and as the assignee of the homeowners, its right to a day in court to litigate a cause of action provided by the Virginia Legislature. Despite that due process requires that a

litigant at least be allowed to raise claims for relief and damages that are provided under applicable common and/or statutory law, the trial court ran roughshod over Winchester's rights by failing to acknowledge its basic standing to advance its claims in court. This is particularly significant because standing is of such a threshold magnitude that its determination pre-empts issues such as jurisdiction, consideration of applicable statutes of limitations and/or other claim barring procedures or defenses, and the merits of a case. In short, if one is barred from the courtroom for lack of standing, all other aspects of, or need for, the judicial system become insignificant and inconsequential.

The Virginia General Assembly established Winchester's standing in this case, and the trial court's ruling that Winchester lacked standing because it no longer owned the FRT plywood is clearly erroneous. The Virginia Code defines a "buyer" as "a person who buys or contracts to buy goods," § 8.2-103(1)(a), and "goods" are defined as "all things . . . which are moveable *at the time of identification to the contract for sale.*" Va. Code Ann. § 8.2-105(1) (emphasis added). It is undisputed that *at the time of purchase* Winchester was a "buyer" and the FRT plywood was a "good" within the meaning of the Virginia Code. As a buyer of goods, Winchester is entitled to recover for damages for breach of warranty, including incidental and consequential damages, *i.e.*, the costs associated with the inspection and repair of the townhome roofs necessitated by the defective FRT plywood. *See* Va. Code Ann. §§ 8.2-714, 715.

The fact that Winchester purchased the goods for incorporation into the townhome roofs does not remove that original purchase transaction from the scope of the UCC.[9]

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[9] The trial court, not Winchester, erroneously shifted the focus of the case from Winchester's purchase of a good, the FRT plywood, to the homeowners' purchase of a townhome. Likewise, it was the trial court that denied Winchester's standing in its own right, forcing it to proceed as assignee of townhome owners. Had Win-

The Virginia Code states that "each provision of this title with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies *irrespective of title to goods* except where the provision refers to such title," Va. Code Ann. § 8.2-401 (emphasis added), and neither the definition of a buyer nor the other provisions applicable to Winchester's purchase make any reference to title of the goods. In fact, the Code

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chester's original pleadings been accorded as they were entitled to be, this unnecessary shifting of focus would not have occurred because Winchester would have been permitted to pursue its claims in its own right. Moreover, the common law causes of action available to Winchester in its own right, but not as assignee of the homeowners, would have survived the trial court's erroneous classification of FRT plywood as realty. Thus, to reiterate, the JNOV ruling serves only to magnify the original error of denying Winchester standing in its own right.

Winchester can only surmise that the focus of the case was shifted from its purchase of the defective FRT plywood to the townhomes because the townhomes became so integral to other issues in the case, thus leading to confusion about the correct subject of Winchester's cause of action. While the trial court's apparent confusion may be understandable, it is legally and intellectually void. This case is about the purchase of plywood, not the purchase of townhomes. If the nature of the degradation of the FRT plywood had become known to Winchester before it was used in the townhome construction, no party could contend that Winchester did not have standing to sue. In fact, respondent Hoover Treated admitted this point: "HTWP agrees that a 'buyer' has standing to sue under the UCC . . . ['buyer' means a person who buys or contracts to buy goods]. Indeed, if Winchester was the 'buyer' whose rights were litigated in this action, *it would have standing to sue.*" Hoover Treated's Reply Brief for its Motion for JNOV, at 2 (emphasis added) (App. 45a). Thus, it is clear that under Virginia law Winchester is the buyer whose rights should be litigated in this action.

Winchester recognizes that issues of state law are generally outside this Court's consideration. Nevertheless, Winchester has set forth the basis for its claims for standing above in order to demonstrate that the legislature has conferred a statutory right to maintain a cause action against Respondents. Such a showing is a predicate for Winchester's constitutional argument.

contemplates that a buyer may resell goods, and expressly allows consequential damages for any loss after resale. Va. Code Ann. § 8.2-715(2)(a) cmt. 6 (1991).[10] In the face of such unmistakable standing rights granted by the Legislature, it was error for the trial court to deny Winchester's standing in its own right and as assignee of the homeowners.

Indeed, under the trial court's analysis, no party can assert a cause of action arising out of a sale of defective FRT plywood that would withstand the trial court's interpretation of the standing doctrine—despite a mandate by the Virginia General Assembly to the contrary. By this construction, the Virginia court invaded the province of the Virginia Legislature by effectively rendering meaningless section 8.2 of the Virginia Code,[11] and consequently deprived Winchester of its fundamental right of access to the court to seek the only existing remedy for its injuries.

A. Procedural Due Process

This Court, in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), specifically recognized that this type of deprivation violates the procedural safeguards of the Fourteenth Amendment.

In *Brinkerhoff-Faris*, petitioner brought an action in equity to protest against an allegedly discriminatory tax. *Id.* The Missouri courts denied petitioner relief on the grounds that it had failed to seek an administrative rem-

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[10] *See Step-Saver Data Sys. v. Wyse Tech.*, 912 F.2d 643 (3rd Cir. 1990); *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102 (4th Cir. 1980); *Westcott-Alexander, Inc. v. Dailey*, 264 F.2d 853 (4th Cir. 1959); Ronald A. Anderson, *The Uniform Commercial Code* § 2-103:6 (3rd ed. 1981).

[11] In *Moody v. Southern Railway Co.*, 169 Va. 765, 768, 194 S.E. 679, 681 (1938), the Virginia Supreme Court held: "This court cannot ignore a solemn legislative enactment. If the statutes are legally sound, in that they cannot be successfully assailed for some adequate cause, constitutional or otherwise, then the court cannot alter or abrogate them by interpretation or construction."

edy which, in fact, did not exist until the Missouri Supreme Court recreated it, on petitioner's very appeal, at which point it was too late to be pursued. *Id.* at 679. Ironically, the administrative remedy had not previously existed because, six years earlier, the Missouri Supreme Court had ruled that the state tax commission was powerless to entertain claims like that presented by petitioner. Writing for this Court, Justice Brandeis held:

> The violation is nonetheless clear when [the deprivation of plaintiff's property without affording it an opportunity to seek a remedy] is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative branch of government.
>
> It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state . . . and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.
>
> But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits. . . . *Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support.* Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; . . . [b]ut, *while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing,*

> *accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.*

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680-82 (1930) (emphasis added) (citation omitted).

In the instant case, the Virginia trial court did not declare section 8.2 unconstitutional, nor did it merely erroneously interpret that section in such a manner as to exclude those buyers who no longer retained title to the purchased goods. Instead, the trial court denied Winchester's remedy under the UCC and provided Winchester with an alternate remedy—the right to sue as assignee of the homeowners—only to subsequently withdraw that right, thus depriving Winchester of either available remedy.[12] It is beyond debate that either Winchester or the townhome owners had to be considered "buyers" for the purpose of bringing suit under the UCC; nevertheless, the Virginia courts failed to recognize their standing as such. While the trial court possessed the power to interpret section 8.2, and perhaps even to do so erroneously without implicating a federal issue, it had no authority to completely eradicate Winchester's only remedy as provided by the Virginia Legislature. Further, by refusing to find error with the trial court's rulings, the Virginia Supreme Court perpetuated the due process violation; Winchester was never afforded a "*real* opportunity" to protect its statutory right to sue for damage *as a buyer of goods*. Rather, although it attempted to protect its right, and, before the JNOV, was lead to believe it had done so successfully, Winchester was given the opportunity only

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[12] Furthermore, because the ruling which operated to deprive Winchester of any and all state remedies was made pursuant to a motion for JNOV, Winchester was, in effect, deprived of its right under the Seventh Amendment to have a jury decide the merits of its claim.

to protect its right to bring suit as assignee of the town-home owners, after the issue had already been adjudicated in its favor.

In other words, like the petitioner in *Brinkerhoff-Faris,* once the trial court denied its statutory remedy in its own right, Winchester pursued the only remedy available to it, in this case as determined by the trial court, only to have that remedy quashed by the same court that granted it. Indeed, the only difference between the two cases is that here, Winchester was instructed by the trial court to pursue a remedy which was *later* found unavailable to it by that same court, whereas in *Brinkerhoff-Faris,* petitioner was told it should have pursued a remedy which the very same court had *previously* held unavailable. In both cases, the petitioners relied upon their respective court's rulings and sought to their detriment the only remedy available to them in light of those rulings. Such a course of events offends the Due Process Clause of the Fourteenth Amendment.

B. Substantive Due Process

In addition to what could be considered a procedural due process violation, as stated above, the Virginia courts' rulings also denied Petitioner its substantive due process right of access to the courts. Indeed, in a case such as this, there is significant overlap between the procedural and substantive protections provided by the Due Process Clause. The federal courts, however, disagree as to the existence, source and nature of the substantive right of access to the courts.

1. *This Court Should Resolve the Split Among the Federal Circuits Regarding the Substantive Constitutional Right of Access to the Courts.*

Some courts, such as the Fifth Circuit, hold there is a substantive right of access to the courts and acknowledge that the right of access is fundamental. Other circuits,

however, insist that the right is not fundamental, and furthermore, some federal courts refuse to recognize that there is any substantive right of access, whatsoever.

In *Ryland v. Shapiro,* 708 F.2d 967 (5th Cir. 1983), the Fifth Circuit held that "[t]he right of access to the courts is basic to our system of government, and it is well established today that it is one of the *fundamental* rights protected by the Constitution." *Id.* at 971 (emphasis added). The court emphasized that "under our Constitution, the right of access to the courts is guaranteed and protected from unlawful interference and deprivations by the state, and only *compelling* state interests will justify such intrusions." *Id.* at 972 (emphasis added). The *Ryland* court supported its declaration that access to the courts is a fundamental, substantive right [13] by citing to decisions of this Court which interpret the three (3) constitutional guarantees which the Fifth Circuit contends are the basis for the substantive right of access. *Id.* at 971.

The Fifth Circuit reasoned that the fundamental, substantive right of access to the courts is grounded in the Article 4 protection of the Privileges and Immunities Clause, the First Amendment right to petition the government for redress, and the Due Process Clause of the Fourteenth Amendment. *Id.* at 971-72.[14] First, the court

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[13] The language and structure of the court's opinion makes it perfectly clear that the Fifth Circuit recognizes that the substantive right of access to the courts is entirely separate from any procedural safeguards to which a litigant may be entitled. 708 F.2d at 971-72.

[14] *See Simmons v. Dickhaut,* 804 F.2d 182 (1st Cir. 1986) ("The right of access is a discrete, constitutional right, derived from various constitutional sources. It springs in part from the Due Process Clause, the Privileges and Immunities Clause, and the First Amendment. The right of access is fundamental."); *Lee X v. Casey,* 771 F. Supp. 725, 730 (E.D. Va. 1991) ("[T]he right of access to courts is an essential and fundamental right. . . . In fact, a number of courts have recognized that the right of access arises

observed that this Court has viewed the right of access to the courts as one of the privileges and immunities accorded under Article 4 of the Constitution and the Fourteenth Amendment:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but it is granted and protected by the Federal Constitution.

Id. (quoting *Chambers v. Baltimore & Ohio Ry.*, 207 U.S. 142 (1907) (recognizing the right of access in the context of a diversity tort suit)). Second, the *Ryland* court observed that this Court has recognized that the First Amendment right to petition provides another basis for the substantive right of access to the courts: "The right of access to the courts is indeed but one aspect of the right of petition." 708 F.2d at 971-72 (quoting *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)).[15] Third, the Fifth Circuit

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from several constitutional sources."); *McCoy v. Goldin*, 598 F. Supp. 310, 315 & n.4 (S.D.N.Y. 1984) (in holding that the right of access is based on the First Amendment and Due Process Clause, the court stated: "The right of access to the courts cannot be infringed upon or burdened. It is as fundamental a right as any a person may hold.").

[15] *See also Alexander v. Macoubrie*, 982 F.2d 307, 308 (8th Cir. 1992) (holding that "the right to petition the court for redress of grievances" provided the constitutional basis for a law student to assert a Section 1983 action against bar examiners who allegedly conspired to prevent his former professor from representing him in suit against them); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (Section 1983 action holding that the right of access to the courts is subsumed under the First Amend-

noted that this Court has held that another constitutional basis for the right of access to the courts is the Due Process Clause. *Ryland*, 708 F.2d at 972.

> The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.

Id. (quoting *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (affirming that a state's obligation to provide legal assistance to inmates extends to civil rights actions)).[16]

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ment right to petition the government for redress of grievances); *McCray v. Maryland*, 456 F.2d 1, 6 (4th Cir. 1972) (in acknowledging that the right of access is encompassed in the First Amendment right to petition, the court stated: "Of what avail is it to the individual to arm him with a panoply of constitutional rights if, when he seeks to vindicate them, the courtroom door can be hermetically sealed against him by a functionary who, by refusal or neglect, impedes the filing of his papers?").

[16] In *Ryland*, the plaintiffs asserted a civil rights action under Section 1983 on the grounds that the defendants, acting under color of state law as District Attorneys, knew that Shapiro killed their daughter and that they prevented a full investigation that would have revealed that Shapiro was the murderer. 708 F.2d at 969-70; *see* 42 U.S.C. § 1983 (1988) [allegation of a deprivation of a recognized federal statutory or constitutional right is required to maintain a legally sufficient civil rights claim under Section 1983]. The plaintiffs claimed that the defendants' concealment of their daughter's murder for eleven months wrongfully interfered with their access to the state courts to pursue a wrongful death claim under state law against Shapiro. 708 F.2d at 970.

The district court dismissed plaintiffs' action for lack of federal standing because it viewed the suit as an action to enforce Louisiana's criminal law and "[r]ights which derive solely from state law cannot be the subject of a claim for relief under Section 1983." *Id.* at 970. The Fifth Circuit, however, disagreed and ultimately found that the federal district court erred in dismissing the action because the plaintiffs had a substantive constitutional right of access to the courts as well as a constitutionally protected property right in the wrongful death action. *Id.* at 973. Because the federal

Likewise, in *Jackson v. Procunier*, 789 F.2d 307 (5th Cir. 1986), the Court of Appeals for the Fifth Circuit examined whether the alleged delay of a prisoner's appellate petition by a prison mailroom employee constituted a deprivation of a substantive constitutional right under Section 1983. After reiterating that it had characterized the right of access to the courts as "fundamental" in *Ryland*, the court held that "[a]ny deliberate impediment to access, even a delay of access, may constitute a constitutional deprivation." *Id.* at 311.

Further, the *Procunier* court rejected the defendants' argument that the "right of 'adequate, effective, and meaningful' access to the courts . . . is limited to the presentation of constitutional, civil rights, and habeas corpus claims." *Id.* The court stated that the constitutional right of access to the courts "has from its inception been applied to civil as well as constitutional claims." *Id.* Thus, in remanding the case to the district court for a finding as to the defendants' level of intent, the court concluded that if the petitioner "alleged a deliberate denial of his right of access to the courts to pursue his civil appeal, he has alleged the deprivation of a substantive constitutional right found in the First Amendment, as well as a potential deprivation of substantive and procedural due process." *Id.* at 311.

This interpretation makes sense, especially when viewed in the context of the case at bar. Citizens depend upon

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circuit court found that constitutional (rather than purely state) rights formed the basis of the plaintiffs' Section 1983 allegations, the case was remanded to the district court to assess whether the defendants' actions actually amounted to an interference with the plaintiffs' access to the courts. *Id.* On remand, however, the district court dismissed the plaintiffs' Section 1983 action because it found that there was no factual evidence demonstrating that the District Attorneys' actions after the murder interfered with the plaintiffs' access to the courts for the purposes of filing a wrongful death action. *See Ryland v. Shapiro*, 586 F. Supp. 1495 (W.D. La. 1984).

the various branches of government for a panoply of rights, privileges and protections. Where, as here, the other branches of government have plainly delegated the responsibility to the judiciary to allow a claim to be raised and pursued in a court of law, abdication of that responsibility by the court leaves the litigant with absolutely no form of legally sanctioned redress. The law says that Winchester had the right to go to court to redress a wrong—but the court nevertheless refused to entertain Winchester's claims. The Due Process Clause, at least as interpreted by the Fifth Circuit, does not permit such an unjust result.

Other federal circuits, however, have declared that the right of access to the courts is *not* a fundamental constitutional right. For instance, in *Gronne v. Abrams*, 793 F.2d 74 (2d Cir. 1986), the Second Circuit examined, *inter alia*, whether New York's use of a medical malpractice board in lieu of litigation violated the plaintiffs' due process right of access to the courts. In affirming Judge Weinstein's dismissal of the plaintiffs' action for failure to state a claim on which relief can be granted, the Second Circuit concluded that "there is no general fundamental right of access to the courts." *Id.* It reasoned that any right of access arising out of the substantive protections of the Due Process Clause only safeguard the right to assert violations involving other fundamental constitutional rights. *Id.* (citing *Wolff v. McDonnell*, 418 U.S. at 579).[17]

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[17] The *Gronne* court noted, however, that it is "well-established" that the *legislature* has the authority to abolish a common law right to sue or alter the procedures surrounding that right. 793 F.2d at 78. Thus, the court surmised that a number of courts recognize that the common law right to sue for injuries arising out of malpractice exists "only insofar as it is recognized by the courts or by statute." *Id.*

Incidently, in *Gronne*, the plaintiffs also asserted that the legislation providing for medical malpractice panels in lieu of litigation in court violated the Equal Protection Clause because the legislation

Some federal courts have gone even further in refusing to recognize the existence of a substantive right of access to the courts. For example, in *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 554 (3rd Cir. 1985), the Third Circuit rejected the plaintiffs' claim that its due process rights were violated by applying a statute of limitations that effectively extinguishes claims before they can accrue. The circuit court stated: "There is no absolute and unlimited constitutional right of access to courts. All that is required is a reasonable right of access—a reasonable opportunity to be heard." *Id.* at 555.[18] Similarly, in *Seldon v. Goodman*, 487 F. Supp. 30, 32 (S.D.N.Y. 1980), the court rejected the plaintiff's assertion that he had a substantive constitutional right of access to the courts (and judicial review of his dismissal) because his argument was "something of an overstatement" of the law. In holding that he was not deprived of access to the courts or judicial review through an error made by the defendant (a county court clerk), the district court stated that "[w]hat he at most has is a right not to be deprived by the state of such access and

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discriminated against all medical malpractice plaintiffs, and moreover, a sub-class of medical malpractice plaintiffs who were *not* exempt from litigating their claim in front of the panels based on where the action was venued. *Id.* at 76. In deciding the case on other grounds, the court left open the question of whether the statute at issue "might run afoul of the Constitution by preventing a medical malpractice plaintiff from instituting suit within a reasonable time or from *ever bringing a suit.*" *Id.* at 78. (emphasis added).

[18] In *Ciccarelli*, 757 F.2d at 554, the court also stated that it was not violative of the Equal Protection Clause to extend the discovery rule for statute of limitations to personal injury claims but not wrongful death claims. Because the court concluded that the statutory scheme did not implicate a suspect class or a fundamental right (it held that the right of access was not fundamental), the court found there was no equal protection violation because the goal of prompt settlement of the legal affairs of the dead through the classification of tort claimants satisfied the requisite lower level of review. *Id.*

review without due process of law." *Id.* The court reasoned that "[t]he most that can reasonably be required is that the state provide a mechanism for the correction of mistakes when they occur." *Id.* at 33. In summary, cases such as *Seldon* and *Ciccarelli* appear to hold that there is no substantive constitutional right of access to the courts; rather, there exists only a right not to be deprived of a day in court without the minimal level of procedural due process.

In contrast, at least one other federal circuit presented with the opportunity to decide whether there is a *fundamental* substantive right of access to the courts has failed to pass on the issue. *See Bowman v. Niagara Machine & Tool Works, Inc.*, 832 F.2d 1052, 1053 (7th Cir. 1987). In *Bowman*, the Seventh Circuit rejected the plaintiff's equal protection argument without addressing whether the right of access to the courts was fundamental because the court did not agree with the plaintiff's underlying premise that he was denied the right of access to the courts. *Id.*[19] In doing so, however, the *Bowman* court

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[19] In *Bowman*, the plaintiff argued that the Indiana statute of limitations for products liability actions (as construed by the Indiana courts) was unconstitutional because it violated his right to equal protection of the laws by impeding his access to the courts. *Id.* at 1053. A provision in the statute at issue had been interpreted by Indiana courts to require product liability actions to be filed within ten years after the product is first delivered to the *initial* user or consumer; thus, as a operator of a sheet metal press, which was purchased by his employer over forty years before his injury, the plaintiff was effectively precluded from ever bringing suit for his injuries from his operation of the press. *Id.* at 1053. The district court held that the ten-year statutory limit did not violate his equal protection rights because the provision was rationally related to a legitimate interest the state had in protecting manufacturers from certain losses due to defects in products placed in the stream of commerce. *Id.* at 1053-54. The plaintiff appealed the district court's dismissal of his suit because he claimed that, since the right of access to the courts was fundamental, the district court should have subjected the statute to strict judicial scrutiny requiring the court to find that the legislation advances a compelling state interest. *Id.* at 1054.

described the limitations on the assertion of the right of access as well as the type of substantive protections subsumed within. The court opined:

> Bowman cannot claim that he has been denied access to court simply because *the Indiana legislature* has restricted a particular cause of action in a way that makes it unavailable to him. Such an approach confuses "access" with "success," and Bowman is not constitutionally entitled to the latter. The concept of constitutionally protected access to courts revolves around whether an individual is able to make use of the courts' processes to vindicate *such rights as he may have,* as opposed to the extent to which rights actually are extended to protect or compensate him. . . . Bowman's claim concerns specific substantive rights that the legislature has declined to extend to a group of persons that includes him. Bowman has not alleged that he has been denied access to either state or federal courts to enforce any right that *has* accrued to him. [¶] Because the judicial process is open to him, even if the cause of action he would pursue is not, we conclude that Bowman has failed to present a claim of denial of access to courts by operation of [the Indiana statute].

Id. at 1054-55 (first emphasis added; second and third emphasis in original).

Winchester respectfully submits that the facts in this case, unlike *Bowman,* provide this Court with the opportunity to clarify, confirm and explicate the existence of the substantive right of access to the courts. Namely, in those situations where the legislature has conferred on all citizens a statutory right to bring a cause of action to enforce certain rights, the judiciary may not, via a decision regarding standing or otherwise, completely deny a litigant of his right of access to enforce those rights in the courts without a high degree of justification. In other words, Winchester contends that, at least where a party seeks to have access to the courts to raise statutorily-

provided rights, there is a substantive right of access to the courts, and more importantly, that substantive right of access is fundamental in nature. Winchester does not stand before this Court asking for the right of "success" as the Second Circuit suggested in *Bowman*; it merely requests that this Court acknowledge that Winchester and similarly situated parties are entitled to exercise a substantive right of access to the courts to at least have the chance to "vindicate such rights as [they] may have." *See Bowman,* 832 F.2d at 1054-55.

Federal courts such as *Seldon* and *Ciccarelli* that appear to refuse even to recognize the existence of the substantive right of access to the courts are misguided by the belief that the right of access is derived solely from the procedural safeguards of the Due Process Clause of the Fourteenth Amendment. As the Fifth Circuit has observed, the right of access to the courts is derived from multiple constitutional sources and the right provides both substantive and procedural protections. That is not to say, however, that the due process cases which discuss the fundamental nature of the right are not helpful to the analysis here. To the contrary, the next section examines this Court's decisions which examine the right of access to the courts in a due process context and provide additional support for Winchester's contention that the substantive right of access to the court, where applicable, is indeed fundamental.

2. *Under the Due Process Analysis in* Boddie *and* Kras, *Winchester's Denial of Access to the Courts to Maintain a Cause of Action Authorized by the State Legislature Constitutes a Deprivation of a Fundamental, Substantive Right.*

This Court's prior decision relating to the right of access to the courts in *civil* cases have been extremely narrow insofar as they discuss only whether there was a constitutional right to bring a specific kind of civil action

(*i.e.*, divorce or bankruptcy).[20] In *Boddie v. Connecticut*, 401 U.S. 371 (1971), this Court held that the indigent petitioners in that case were unconstitutionally deprived of their access to the courts by state-imposed fees which effectively barred them from bringing their actions for divorce. *Id.* at 380. Justice Harlan reiterated that the Court had previously held that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Id.* at 377. He further explained:

> We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording

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[20] In the criminal context, this Court has recognized that a prisoner's substantive right of access to the courts is a fundamental right. *See, e.g., Bounds v. Smith*, 430 U.S. 817, 828 (1977) ("[T]he *fundamental* constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.") (emphasis added); *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (in striking down a regulation which prohibited prisoners from helping each other with habeas corpus applications, this Court stated that "it is *fundamental* that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.") (emphasis added).

> all citizens access to the means it has prescribed for doing so.

Id. at 382-83. In his reasoning, Justice Harlan further emphasized that the petitioners pursuit of the dissolution of a marriage carried special weight:

> [M]arriage involves interests of basic importance in our society. It is not surprising, then, that the States have seen fit to oversee many aspects of that institution. Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. . . . [W]e know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.

Id. at 376.[21]

On the other hand, in *United States v. Kras,* 409 U.S. 434, 444-45 (1973), this Court declined to extend the right of access to an indigent seeking a discharge in bankruptcy because it did not find that the elimination of the indigent's debt burden rose to the same constitutional level of the dissolution of the marriage in *Boddie.* Justice Harlan stated:

> In contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors. . . . [¶] [A] debtor, in theory, and often in actuality, may adjust

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[21] *See also Doe v. A Corp.,* 709 F.2d 1043, 1048 (5th Cir. 1983) (in discussing right of a lawyer to bring a claim against a former client, the court stated that "[w]hile the *Boddie* principle does not give any broad 'right' of access to federal court, the courtroom door should not lightly be barred to a person who has a tenable legal claim.").

> his debts by negotiated agreement with his creditors. At times the happy passage of the applicable limitation period, or other acceptable creditor arrangement, will provide the answer. Government's role with respect to the private commercial relationship is qualitatively different from its role in the establishment, *enforcement,* and dissolution of marriage.

Id. at 445 (emphasis added). Subsequently, this Court characterized its holding in *Kras* as follows: "[W]e agreed that a due process right of access to the courts exists when fundamental interests are present and the State has exclusive control over 'the adjustment of [the] legal relationship[s].' " *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430 n.5 (1982) (observing that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause) (quoting *Kras,* 409 U.S. at 445).[22]

Winchester recognizes that this Court's due process decisions do not yet hold that there is a broad fundamental, substantive right of access to the courts for all civil litigants regardless of the cause of action. This case, however, fits within the due process right of access identified by this Court in *Boddie* and *Kras,* since Winchester was compelled by state law to seek relief in the state court for the injuries it incurred.

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[22] It is also important to note that in explaining the "analogous" relationship between the reasoning used in analyzing the due process right of access to the courts in *Boddie* and the procedural due process issues in *Logan,* this Court provided the following standard for reviewing those instances where the State deprives an individual of a protected property interest without the proper degree of due process:

> [W]hile the right to seek a divorce may not be a property interest in the same sense as is a tort or a discrimination action, the theories of the cases are not very different: having made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme.

Logan, 455 U.S. at 430 n.5.

Winchester accepts this Court's assertion in *Boddie* and *Kras* that the creation and rescission of a commercial contract can be completed without judicial assistance; however, the *enforcement* of rights created by statute—like the dissolution of a marriage contract—can only be achieved through the courts. In fact, the only way to seek redress under applicable Virginia law was for Winchester to file this lawsuit. It logically follows that the right of access to the courts must be deemed fundamental in this instance because the state courts have the exclusive legal control over the enforcement of Winchester's and the homeowners' legal relationship with the Respondents. Winchester must be provided with access to the courts to enforce its rights arising from its dealings with Respondents under a state-created cause of action because, unlike the bankruptcy petitioner in *Kras,* it has no other means of enforcing its rights. Hence, denial of Winchester's substantive right of access to pursue its statutorily provided cause of action is the deprivation of a fundamental right. The trial court's standing decisions should therefore be subjected to a high level of constitutional scrutiny by this Court under a substantive due process analysis.[23]

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[23] As in its substantive due process claim, if the right of access to the courts is, by itself, deemed fundamental, then the judicial act which deprived one class of such a right, while affording the right to other classes, would subject that act to a high level of constitutional scrutiny on equal protection grounds. Due to the Virginia courts' disregard of Virginia law, certain buyers of goods are treated differently than other buyers of goods. If Winchester lacked the standing to recover under the initially pleaded UCC and common law causes of action as a buyer of the FRT plywood, because those goods had already been transferred to the homeowners at the time that the suit against Respondents was brought, and if Winchester could not recover under the remaining causes of action as an assignee of the homeowners because the FRT plywood was deemed "realty" once it was incorporated into the roofs of the townhomes, then two classes of buyers of defective goods were effectively precluded from asserting a claim against Respondents: (1) a party such as Winchester who purchases a good such as

II. THE ISSUES PRESENTED ARE OF SUBSTANTIAL PRACTICAL IMPORTANCE.

While there may be room to debate whether or not there is indeed a "proliferation" of products liability cases across America, and the purported benefits and/or detriments of those cases, it cannot be said that under our constitutional system of tripartite government access to the courts is not a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. Very little commerce is any longer local in nature; indeed most commerce is national, if not global, in scope. The majority of the states have adopted the Uniform Commercial Code in one form or another, and the products at issue in this case, as with most building products, were not sold and used only in Virginia. It is therefore important that this Court determine and explain whether or not all citizens enjoy a fundamental right of access to the courts.

CONCLUSION

The judgment below produces an extraordinary result. Respondents' FRT plywood has been found defective and the jury which considered the evidence found in favor of Winchester. Yet the lower courts' rulings have deprived the buyer, consumer, and user of the defective FRT plywood of their cause of action under Virginia law, thus allowing the manufacturers and sellers of the FRT plywood to wholly avoid liability in tort, contract, and by statute.

This is not a matter for action by the state legislature. The legislature long ago did its job by providing a statute to enforce contractual rights like Winchester's. The Virginia judiciary should have allowed Winchester its right-

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FRT plywood for future incorporation into homes which are later sold; and (2) the owner of a home in which the defective good is ultimately incorporated. Thus, the trial court's denial of standing also could give rise to an equal protection claim by Winchester.

ful opportunity to enforce that right by trying the case it originally plead, or at the very least, by recognizing the jury verdict obtained by Winchester as the assignee of the homeowners' rights. Winchester's pleadings were ignored, and the resulting denial of Winchester's standing, in its own right and as assignee of the homeowners, deprived Winchester of its fundamental right of access to the courts.

The constitutional safeguards in the American system of jurisprudence are designed to ensure that the courthouse door is open to everyone with a legitimate claim. Yet, despite this basic premise, access to the Virginia state courts has been unconstitutionally denied to Winchester.

For all of the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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July 14, 1994

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 2nd day of March, 1994.

Record No. 931557
Circuit Court No. L-100865

WINCHESTER HOMES, INC.,
Appellant,

against

HOOVER UNIVERSAL, INC., *et al.*,
Appellees.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

DAVID B. BEACH
Clerk

By: /s/ [Illegible]
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 15th day of April, 1994.

Record No. 931557
Circuit Court No. L-100865

WINCHESTER HOMES, INC.,
Appellant,

against

HOOVER UNIVERSAL, INC., *et al.*,
Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 2nd day of March, 1994 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ David B. Beach
Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 100865

WINCHESTER HOMES, INC.,
Plaintiff,

v.

HOOVER UNIVERSAL, INC., *et al.*,
Defendants.

ORDER

This day came defendants, by counsel and through the Steering Committee appointed by the Court on March 22, 1991, and the plaintiff, by counsel, on defendants' Demurrers to the Motion for Judgment filed herein. Upon consideration of the briefs and legal authorities submitted and the oral argument of counsel on May 30, 1991, it is hereby

ORDERED that defendants' Demurrers to the Motion for Judgment shall be, and the same hereby are, sustained. The plaintiff's claims alleged in the Motion for Judgment are dismissed as follows:

(1) The Motion for Judgment, in its entirety, is dismissed for lack of standing, with leave to amend as provided below, to allege standing except as to those counts specifically dismissed with prejudice.

(2) Counts I through X are dismissed, with leave to amend as provided below, on the ground that the format of the Motion for Judgment misjoins the causes of action of each preceding count into the subsequent count.

(3) Count I (Negligent Design and Manufacture) is dismissed with prejudice on the ground that plaintiff has

asserted breach of warranties in Counts V (Breach of Express Warranty), VI (Breach of Implied Warranty of Merchantability and Fitness), and VII (Breach of Implied Warranty of Fitness for a Particular Purpose), and that negligent design and manufacture is the manner in which the defendants allegedly breached these warranties.

(4) Count II (Negligent Failure to Warn) is dismissed with prejudice on the ground that plaintiff has asserted breach of warranties in Counts V (Breach of Express Warranty), VI (Breach of Implied Warranty of Merchantability and Fitness), and VII (Breach of Implied Warranty of Fitness for a Particular Purpose), and that negligent failure to warn is the manner in which the defendants allegedly breached their warranties.

(5) Count III (Strict Liability for Defective Design and Manufacture) is dismissed with prejudice.

(6) Count IV (Strict Liability for Failure to Warn) is dismissed with prejudice.

(7) Count VIII (Fraud and Fraud in the Inducement) is dismissed, with leave to amend as provided below, for failure to allege fraud with the required specificity.

(8) Count IX (Request for Declaratory Relief) is dismissed with leave to amend as provided below.

(9) Count X (The Virginia Consumer Protection Act) is dismissed with prejudice on the ground that the claims asserted by Winchester in the Motion for Judgment do not involve consumer transactions. Winchester has leave to amend to allege an assigned or subrogated claim under the Virginia Consumer Protection Act.

(10) Plaintiff's claim for injury to its business reputation is dismissed with leave to amend as provided below to include a claim for injury to business reputation to the extent recoverable in a cause of action not dismissed with prejudice herein.

(11) Plaintiff's claims against Johnson Controls, Inc. are dismissed, with leave to amend as provided below, on the ground that plaintiff's Motion for Judgment fails to allege sufficient facts to support a claim that Johnson Controls, Inc. can be held liable for the acts of Hoover Universal, Inc., now a subsidiary of Johnson Controls, Inc.

(12) Plaintiff's claims against Ply-Gem Industries, Inc. are dismissed, with leave to amend as provided below, on the ground that plaintiff's Motion for Judgment fails to allege sufficient facts to support a claim that Ply-Gem Industries, Inc. can be held liable for the acts of its subsidiary, Hoover Treated Wood Products, Inc.

It is further ORDERED that plaintiff shall have through and until June 24, 1991, within which to file an Amended Motion for Judgment, and defendants shall have 21 days after service of the Amended Motion for Judgment to file their responses thereto.

Enter: July 25, 1991

/s/ William J. Plummer
Judge

We ask for this:

Chesapeake Corporation;
Hoover Universal, Inc.;
Johnson Controls, Inc.;
Hoover Treated Wood Products, Inc.;
Mid-Atlantic Wood Preservers;
Ply-Gem Industries, Inc.;
Timber Products Inspection, Inc.;
Osmose Wood Preserving, Inc.
Applied Research Group, Inc.; and
Reliance Wood Preserving, Inc.

By Defendants' Steering Committee

/s/ Jack E. McClard
JACK E. MCCLARD
HUNTON & WILLIAMS
P.O. Box 1535
Richmond, Virginia 23212
(804) 788-8200
Attorney for Defendant
Chesapeake Corporation

Seen and objected to for the following reasons:

(1) the arguments set forth in plaintiff's March 18, 1991 Consolidated Response in Opposition to defendants' Demurrers;

(2) the arguments set forth in the April 19, 1991 Reply of plaintiff to defendants' Joint and Supplemental Memorandum in Support of Demurrers;

(3) the argument of counsel at the May 30, 1991 hearing to consider the Demurrers to the Motion for Judgment;

(4) Winchester has standing by virtue of alleged injury to itself, and as subrogee to the claims of homeowners, and through the assignment of claims it has and continues to receive from homeowners;

(5) Count I (Negligent Design and Manufacture) and Count II (Negligent Failure to Warn) are recognized under the law of Virginia; the court sustained the Demurrers on these two counts on the basis that plaintiff had pled a claim for breach of warranty, however, a plaintiff may plead alternative theories of recovery, Va. Code Ann. § 8.01-281; Rule 1:4(k) of the Rules of the Supreme Court of Virginia, and may join contract and tort claims in one action, Va. Code Ann. § 8.01—272;

(6) Count VIII (Fraud and Fraud in the Inducement) is pled with the requisite specificity;

(7) Count IX (Request for Declaratory Relief) is pled properly and states a cause of action for relief under Virginia law;

(8) Count X (Virginia Consumer Protection Act) is pled properly; and

(9) Plaintiff's claims against Johnson Controls, Inc. and Ply-Gem Industries, Inc. are pled properly to hold these defendants liable for the acts, omissions and misconduct of their respective subsidiary corporations.

/s/ Michael J. McManus
MICHAEL J. MCMANUS
MARY LYNN REED
JACKSON & CAMPBELL, P.C.
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Attorney for Plaintiff
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NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030

County of Fairfax City of Fairfax

April 16, 1993

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RE: *Winchester Homes, Inc. v. Hoover Universal et al.*, At Law No. 100865

Dear Counsel:

This matter comes before the Court on Defendant Hoover Treated Wood Products, Inc.'s ("Hoover Treated") Application for Judgment Notwithstanding the Verdict or for a New Trial and Plaintiff Winchester Homes, Inc.'s ("Winchester") Motion to Conform Damage Award to Evidence Presented and Motion for Sanctions. Hoover Treated contends, *inter alia*, that the Uni-

form Commercial Code ("UCC") does not apply to the plywood at issue in this case since the plywood was incorporated into realty. Winchester asserts that the jury erroneously apportioned the verdict between Winchester and a non-party and that, at any rate, no evidence supported the jury's apportionment. Winchester also asserts that Hoover Treated's Grounds of Defense failed to comply with the requirements of Va. Code Ann. § 8.01-271.1 (Repl. Vol. 1992) and that sanctions are appropriate.

Having considered the arguments and memoranda of counsel and for the reasons set forth below, the Court sustains the Application for Judgment Notwithstanding the Verdict and overrules the Motion to Conform Damage Award and the Motion for Sanctions.

FACTS

This is a products liability case brought by a builder-developer against a building supplier. The plaintiff-builder, Winchester, purchased flame retardant treated plywood ("FRTP") from the defendant-supplier, Hoover Treated, for use as roof sheathing in townhomes. Several years after construction of 1500 or more townhomes, Winchester learned that FRTP was prematurely decaying in townhome roofs and launched an inquiry. As a result of this inquiry, Winchester entered into an agreement with the homeowners to repair or replace FRTP in exchange for a release and assignment of potential legal claims. Winchester brought suit against Hoover Treated on claims involving townhome roofs, contending that the FRTP was defective, unsafe and unsuitable as roof sheathing.

This case proceeded, at differing times, on numerous theories, including negligent manufacture, negligent failure to warn, breach of the Virginia Consumer Protection Act, breach of the federal Magnuson-Moss Act, breach of implied and express warranties and indemnification

and subrogation. Winchester asserted standing to bring these claims as an assignee, subrogee or indemnitee.

On September 16, 1992, the Court heard dispositive motions before trial. Hoover Treated's Motion to Strike/Demurrer/Plea in Bar/Summary Judgment was sustained in part and overruled in part. Winchester's indemnification claim was dismissed without prejudice because the cause of action for indemnification had not accrued before the time of filing. The motion for summary judgment was sustained, the Court ruling that Winchester disclaimed the Virginia implied statutory warranties under Va. Code § 55-70.1 (Repl. Vol. 1986 & Supp. 1992) and that the express warranties that Winchester gave to the homeowners excluded "roof sheathing." Accordingly, after September 16, 1992, Winchester proceeded as the assignee of the homeowners with two remaining claims, breach of express and implied warranties under the UCC.

On the opening day of trial, Hoover Treated filed a motion in limine, asserting that the UCC did not apply to the FRTP in question since it was incorporated into realty and no longer constituted "goods." Hoover Treated also asserted that any express or implied warranties must have been given by Winchester directly to the homeowners. Winchester's theory of the case was that Hoover Treated made implied and express warranties under the UCC and that these warranties initially ran to Winchester, the buyer of the FRTP. When Winchester incorporated the plywood into townhouses, warranties passed to the homeowners under Code § 8.2-318 (Repl. 1991), the anti-privity statute.[1] The Court refused to

[1] In its memorandum opposing the Application for Judgment Notwithstanding the Verdict, Winchester asserts that the representations made in the Home Care Manual distributed to each homeowner included express warranties given by Hoover Treated. Winchester also contends that the span rating stamp printed on each sheet of FRTP was an affirmation by Hoover Treated to the homeowners that the plywood had certain strength characteristics. The Court rejects these theories for the reasons stated in Hoover

consider Hoover Treated's motion on the first day of trial due to the potential unfair prejudice to Winchester.

After three weeks of trial, the jury returned a verdict for Winchster in the amount of $434,185. The jury found that Hoover Treated breached the UCC implied warranty of fitness for a particular purpose and express warranties. The jury found that Hoover Treated did not breach the UCC implied warranty of merchantability.

Hoover Treated now renews its pre-trial objection regarding the UCC by moving for judgment notwithstanding the verdict. Winchester has responded by moving to conform the damage award to the evidence and by moving for sanctions.

DISCUSSION

I. MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

Under Virginia Code § 8.01-430, a court may set aside a jury verdict and enter final judgment only where the verdict is plainly wrong or without credible evidence to support it. *Dutton v. Locker*, 224 Va. 535, 297 S.E.2d 814 (1982). A court may also grant judgment notwithstanding the verdict where the verdict is predicated on a motion for judgment that does not state a cause of action entitling the plaintiff to recover. 11A Michie's Jur. *Judgments and Decrees* § 28 at 66 (Repl. Vol. 1978); 46 Am.Jur.2d *Judgments* § 114 at 389. Such a verdict may be set aside even if the defendant failed to demur. 6A Michie's Jur. *Demurrer* § 29 (Repl. Vol. 1991); *Burke's Pleading and Practice* § 214 at 355 (4th ed. 1952); *Boyles' adm'r v. Overby*, 52 Va. (Grattan) 202, 204-05 (1854); *Mason v. Farmer's Bank*, 39 Va. (Leigh) 84, 90 (1841).

Treated's Reply. In addition, the Home Care Manual was not introduced into evidence.

Hoover Treated argues that Winchester does not have a cause of action because it is an assignee of the homeowners, and the UCC warranties did not pass to the homeowners from Hoover Treated since the homeowners purchased realty, not "goods" as defined under the UCC. The Court agrees.

Two transactions were involved in this case—the sale of FRTP between Winchester and Hoover Treated and the sale of townhomes between Winchester and the homeowners. Not surprisingly, Hoover Treated focuses on the second transaction because the UCC does not apply to the sale of realty.[2] Winchester does not contend that the UCC is applicable to real estate transactions. Instead, it argues that the Court should focus on the first transaction, in which the FRTP constituted "goods" under the UCC. This transaction, Winchester asserts, was between the builder and the component manufacturer; all warranties given to Winchester, therefore, passed to the homeowners under § 8.2-318. No Virginia case exists which addresses this issue directly. *Bruce Farms, Inc. v. Coupe*, 219 Va. 287, 288, 247 S.E.2d 400, 401 (Va. 1978), is not dispositive because in that case the suit against the component manufacturer was non-suited, and hence, the Vir-

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[2] *See, e.g., Bruce Farms, Inc. v. Coupe*, 247 S.E.2d 400, 402 n.1 (Va. 1978); *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982); *Lupinski v. Heritage Homes, Ltd.*, 535 A.2d 656, 658-59 (Pa. Super. 1988); *Gable v. Silver*, 258 So. 2d 11, 17-18 (Fla. Ct. App. 1972); *Gallegos v. Graff*, 508 P.2d 798, 799 (Colo. Ct. App. 1973); *Fink v. Denbeck*, 293 N.W.2d 398, 401 (Neb. 1980); *Sponseller v. Meltebeke*, 570 P.2d 974, 976 n.3 (Or. 1977); *Richards v. Powercraft Homes, Inc.*, 678 P.2d 427, 429 n.3 (Ariz. 1984); *Arlen Hills North Homes Ass'n v. Pemtom, Inc.*, 475 N.W.2d 495, 499 (Minn. Ct. App. 1991); *Pollard v. Saze & Yalles Dev. Co.*, 108 Cal. Rptr. 174, 178 (Cal. Ct. App. 1973); *White v. Peabody Const. Co., Inc.*, 434 N.E.2d 1015, 1021 (Mass. 1982); *In Re Levingston*, 119 B.R. 935, 941 (Bkrtcy. N. D. Miss. 1990); *Ferguson v. Alfred Schroeder Dev. Co.*, 658 S.W.2d 62, 64 (Mo. Ct. App. 1983); *Vernali v. Centrella*, 266 A.2d 200, 203 (Conn. Ct. App. 1970); *see also* R. Anderson, *Uniform Commercial Code*, at 572-73 (3d ed. 1981).

ginia Supreme Court never addressed the pass-through issue.

To determine which transaction resolves the rights of the parties, Hoover Treated focuses on the language of the Code. Article 2 of the UCC applies only to "transactions in goods." § 8.2-102. "Goods" are defined as "all things . . . which are moveable at the time of identification to the contract for sale." § 8.2-105. Hoover Treated then argues that, since Winchester is the assignee of the homeowners, the only relevant contracts are those involving the homeowners. Since the FRTP was not movable when identified by the homeowners' contracts of sale, the UCC is inapplicable.

This analysis is not self-evident. Virginia is unique among the states because it has an anti-privity statute while the UCC's applicability in other states is more circumscribed. Virginia Code § 8.2-318, in pertinent part provides:

> Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express, implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods.

Code § 8.2-318 allows the UCC warranties to extend down the chain of distribution. Hence, citation to the simple UCC language, such as "transactions in goods" or "identification to the contract of sale," is not dispositive of the issue. The question remains as to which transaction should be examined to determine whether the transaction involves "goods." If the first transaction is focused on, the homeowners in this case would likely fall within the language of the anti-privity statute because the FRTP

constituted "goods" at that time and the homeowners were "person[s] whom the manufacturer . . . might reasonably have expected to use, consume or be affected by the goods." § 8.2-318.

Nonetheless, the Court finds since the FRTP was subsequently incorporated into realty, extending the UCC's applicability under § 8.2-318 to such building components, would be against public policy.[3] Hence, the second transaction determines the rights of the parties.

Virginia Code § 8.1-102(2)(c) states that an underlying purpose of the UCC is "to make uniform the law among the various jurisdictions." No case cited by either party indicates that the § 8.2-318 pass-through feature makes the UCC applicable to realty.[4] Indeed, if the UCC was interpreted to apply to components incorporated into realty, the result would be extraordinary. *See supra* n.2. While § 8.2-318 obviously relaxed the UCC requirement

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[3] Home appliances, such as dishwashers, refrigerators or air conditioning units, may remain "goods" under the UCC. *See, e.g.*, § 8.2-107. However, building components, such as mortar, dry-wall and plywood that are transformed into a building, would not stand on the same footing as "goods" under the UCC. The Court also notes that a different case would be presented if the parties were in direct privity. In such a case, there would be need to rely upon § 8.2-318.

[4] *See Coakley & Williams, Inc. v. Shatterproof Glass*, 778 F.2d 196, 198 (4th Cir. 1985) (interpreting an analogous Maryland statute which differs from Virginia statute because Maryland expressly eliminated privity by expanding definition of seller while Virginia expanded definition of buyer and seller); *Fair Hill Condominium v. Olney Center, et al.*, At Law No. 72478 (Montgomery Co. Cir. Ct. Md.) (same); *Herman v. Bonanza Builders, Inc.*, 390 N.E.2d 536 (Neb. 1986) (court looked at transaction between builder and consumer because that was only transaction before court); *Twin Lakes Mfg. Co. v. Coffey*, 222 Va. 467, 473 (1981) (holding a mobile home is a good); *Baham v. General Shale*, 377 S.E.2d 830 (W.Va. 1988) (irrelevant as indicated by note 1 in Winchester's Response); *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102 (4th Cir. 1980) (same).

of privity, it did not extend privity so far as to eviscerate the Code's uniform inapplicability to realty.

Another policy reason § 8.2-318 should not be interpreted to apply to building components is that component manufacturers would then become the primary warrantors of residential housing instead of developers, and such a change would have broad economic consequences. Currently, the UCC implied warranties do not pass to the purchasers of residential housing. Rather, purchasers receive consumer protections under Virginia Code § 55-70.1 from the developer. Under § 55-70.1, the developer bears the economic costs of faulty construction and may bargain with the purchaser and disclaim the statutory warranties.

If the UCC were interpreted to apply to the purchase of residential housing, there would be dramatic economic consequences. If the UCC implied warranties given by the component manufacturer pass through to the purchaser of residential housing, the developer would have no incentive to extend warranties. Consumers would then look to the component manufacturer instead of the developer for protection, and the protections given by the General Assembly under Code § 55-70.1 would be irrelevant.[5] Furthermore, the potential liability of the compo-

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[5] The interpretation of § 8.2-318 extending the UCC to building components is not warranted by the equities of this case. Winchester provided an extensive homeowner's warranty insurance policy to its customers. That policy excluded roof sheathing and, therefore, could not form the basis of Winchester's cause of action. In the homeowners' sales contracts, Winchester expressly disclaimed all implied statutory warranties under Code § 55-70.1 and all other express warranties. Winchester now asserts that Hoover Treated extended express and implied warranties in an effort to place the economic costs of roof replacement upon Hoover Treated. If this Court were to interpret the UCC to apply to the homeowners, it would be extending more protection to the homeowners than Winchester actually provided. This is not a case where consumers have fallen through their roofs or where consumers have been personally or financially injured. Winchester has replaced all of the affected roofs. Hence, this case involves nothing more than the shifting of economic costs.

nent manufacturer would increase as additional uses of the manufacturer's product would then be under warranty. This, in turn, would result in increased component costs as the manufacturers attempt to spread the costs of greater liability to consumers.

Finally, and perhaps most importantly, the Virginia Supreme Court has held that where the change in the law is significant, the proper forum to address the issue is the General Assembly, not the courts.[6] In *Bruce Farms, Inc. v. Coupe*, 219 Va. at 293, 247 S.E.2d at 404, the Court held that:

> [where an issue involves] a multitude of competing economic, cultural and societal values . . . courts are ill-equipped. . . . On the other hand, the legislative machinery is specially geared to the task. A legislative change in the law is initiated by introduction of a bill which serves as public notice to all concerned. The legislature serves as a forum for witnesses representing interests directly affected by the decision. The issue is tried and tested in the crucible of public debate. The decision reached by the chosen representatives of the people reflects the will of the body politic. And when the decision is likely to disrupt the historic balance of competing values, its effective date can be postponed to give the public time to make necessary adjustments.

The Court finds that the General Assembly has not sufficiently indicated an intent to extend the UCC under § 8.2-318 to include building components. Arguments

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[6] The General Assembly has been investigating the Commonwealth's FRTP problems. The Department of Housing and Community Development submitted a report to the Assembly in its 1993 session in which the Department recommended extending the protections of Code § 55-70.1 to include FRTP roof sheathing. Department of Housing and Community Development, Report to the General Assembly of 1993, H. Doc. 24, at 10, 13, 15 (1993).

extending the UCC's applicability should be addressed to the legislature, not to this Court.

Therefore, the Court holds that the appropriate transaction to focus on is the second one, which involves Winchester's sale of townhomes to the homeowners. As a result of the public policy considerations stated above, Winchester may not focus solely on the transaction between it and Hoover Treated, and no UCC warranties passed through to the homeowners, or to Winchester as their assignee, from Hoover Treated under § 8.2-318. The second transaction determines the rights of the parties. The UCC did not apply to this transaction because it involved realty. *Bruce Farms, Inc.*, 219 Va. at 289 n.1, 247 S.E.2d at 402 n.1. Accordingly, Winchester lacks a cause of action, and the Court grants the Application for Judgment Notwithstanding the Verdict and will enter an order granting judgment to the Defendant.

Since the Court holds that the UCC is inapplicable, the Court's determination of this threshold issue moots the remaining matters in the Application for Judgment Notwithstanding the Verdict as well as Winchester's Motion to Confirm Damage Award.[7]

II. MOTION FOR SANCTIONS

The Court overrules Winchester's Motion for Sanctions. This was a very complex case in which the Third Amended Motion for Judgment was more than 150 para-

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[7] The Court notes that both parties objected to the Court's use of a special verdict form. The Court ruled that a special verdict form was necessary in this complex case in order to guide the jury in its deliberations. *Cf.* § 8.01-377 (Repl. Vol. 1992). The Court opines that the verdict form is useful to the trial and appellate courts in reviewing the jury findings regarding multiple warranty claims in complex litigation. Further, the use of special verdict forms is recommended by the Manual For Complex Litigation. *Manual for Complex Litigation, Second* § 21.633 (1985).

graphs long. The Court has conducted at least five hearings on dispositive motions.

In general, the Court believes that each side in this dispute has spent a significant amount of time and money bringing sanctions against each other. Hoover Treated joined a Joint Motions for Sanctions, which was heard after the September 16, 1992, hearing and was based upon Winchester's failure to assert valid claims for indemnification and subrogation. The Court overruled this motion. Winchester now has filed a motion for sanctions since the jury has returned a verdict in its favor.

Sanctions are not appropriate merely because a party loses a motion or a case. Nor are sanctions appropriate because a defense is ultimately unsuccessful. Rather the standard is whether counsel has filed a pleading that is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." § 8.01-271.1. Since Hoover Treated has prevailed in its Application for Judgment Notwithstanding the Verdict, it had an adequate basis, "warranted by existing law," for denying liability. Therefore, the Court overrules the Motion for Sanctions.

Counsel for Defendant Hoover Treated will please prepare an order consistent with this opinion and in compliance with Virginia Supreme Court Rule 1:13 and submit it to Counsel for Winchester for endorsement as to form and presentment to the Court, preserving all exceptions to the ruling.

Cordially yours,

/s/ Gerald Bruce Lee
GERALD BRUCE LEE

GBL/llr

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 100865
JUDGE GERALD B. LEE

WINCHESTER HOMES, INC.,
Plaintiff,

v.

HOOVER UNIVERSAL, INC. *et al.*,
Defendants.

FINAL JUDGMENT ORDER

THIS CASE having come on for trial on November 2, 1992, on Plaintiff's Third Amended Motion for Judgment, and Defendant's answer thereto; and a jury having been duly empaneled and sworn; and, following opening statements, the presentation of testimony and documentary evidence on behalf of Plaintiff having commenced on November 3, 1992, and been concluded on November 12, 1992; and Defendant's Motion made at the conclusion of the Plaintiff's case to strike the evidence having been denied by the court; and the presentation of testimony and documentary evidence on behalf of Defendant having commenced on November 12, 1992, and been concluded on November 19, 1992; and Plaintiff's motion made at the conclusion of the Defendant's case for entry of judgment in favor of the Plaintiff having been denied by the court; and the presentation of rebuttal testimony and documentary evidence on behalf of the Plaintiff having commenced and concluded on November 19, 1992; and Defendant's motion made at the conclusion of all

the evidence to strike the evidence having been denied; and the Plaintiff's motion made at the conclusion of all the evidence for entry of judgment in favor of the Plaintiff, having been denied; and the court, after full consideration of proposed jury instructions submitted by both parties, having instructed the jury as to the law of case; and, following closing arguments, the jury having begun deliberation on November 23, 1992, and having returned its verdict on November 24, 1992, in accordance with the special jury verdict form which it completed finding in favor of the Plaintiff on the issues of express warranty and warranty for a particular purpose and in favor of the Defendant on the issues of implied wararnty of merchantability and failure to warn as is reflected in the jury special verdict from attached as Exhibit A; and the members of the jury having individually acknowledged that the verdict of the jury was their verdict after having them polled at the Defendant's request;

WHEREUPON, the Defendant Hoover Treated Wood Products, Inc. filed an application for judgment notwithstanding the verdict or for a new trial; and

WHEREUPON, the Plaintiff Winchester Homes, Inc. filed a motion to conform the damage award to evidence presented and a motion for sanctions, and

WHEREUPON, the court entertained oral argument on said motions

UPON CONSIDERATION of the parties' motions and application and argument on the same and for reasons stated in this court's letter opinion dated April 16, 1993, the court hereby grants and sustains the Defendant's application for judgment notwithstanding the verdict and overrules the Plaintiff's motion to conform damage award and motion for sanctions; and, it is therefore

ADJUDGED, ORDERED AND DECREED that judgment be entered in favor of the Defendant Hoover

Treated Wood Products, Inc. and that the Plaintiff's Third Amended Motion for Judgment be and the same hereby is dismissed with prejudice; it is further

ORDERED that the defendant may submit such requests for costs as the law may allow.

THIS ORDER IS FINAL. This order is suspended for thirty days pending further order of the Court. G. B. Lee.

ENTERED this 25th day of June, 1993.

/s/ Gerald B. Lee
THE HONORABLE GERALD B. LEE

WE ASK FOR THIS: Object as to denial of costs by 2 as to suspension

SICILIANO, ELLIS, DYER & BOCCAROSSE

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McCarter & English

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SEEN AND EXCEPTIONS NOTED:

Jackson & Campbell P.C.

By: /s/ Michael McManus
Michael McManus, Esquire
Warren Lutz, Esquire
Suite 300 South
1120 20th Street NW
Washington, D.C. 20036

ADDENDUM A TO THE FINAL JUDGMENT
ORDER OF JUNE 25, 1993

THIS MATTER comes before the Court on the entry of this Addendum A to the Final Judgment Order of June 25, 1993, said order being fully incorporated herein by reference;

WHEREUPON the Final Judgment Order of June 25, 1993, is hereby amended to incorporate this Addendum A; and, it is therefore

ORDERED that, Defendant Ply Gem Industries, Inc., having previously moved for severance and this court having granted severance for the reasons stated in its ruling of October 8, 1992, judgment shall be entered in favor of Defendant Ply Gem Industries, Inc.; it is further

ORDERED that this Order shall be attached as "Addendum A" to the Order of June 25, 1993.

THIS ORDER IS FINAL.

ENTERED nunc pro tunc July 25, 1993.

/s/ Gerald B. Lee
THE HONORABLE GERALD B. LEE

WE ASK FOR THIS:

SICILIANO, ELLIS, DYER & BOCCAROSSE

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WHITEFORD, TAYLOR & PRESTON

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SEEN AND EXCEPTIONS NOTED:

JACKSON & CAMPBELL, P.C.

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Counsel for Winchester Homes, Inc.

OFFICIAL TRANSCRIPT
BEFORE THE
VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 100865

WINCHESTER HOMES, INC.,
Plaintiff,

v.

HOOVER UNIVERSAL, INC., *et al.*,
Defendant.

Fairfax, Virginia—Thursday, August 15, 1991

HEARING BEFORE: HON. WILLIAM G. PLUMMER

* * * *

There is not a tort of loss of business reputation. That is the damage, the injury, that is measured in part by loss of profits. Your Honor pointed out last time that we had not alleged pecuniary damages. We had not. We have corrected that by specifically alleging pecuniary damages.

Under the Virginia Uniform Commercial Code you are specifically allowed to allege and recover loss of profits in breach of warranty cases, specifically such as this. I would refer your Honor to 8.2-715 of the Code of Virginia.

We have made those specific allegations. And as such, Winchester has standing in its own right above and beyond just the money it's going to have to expend to inspect and repair the roofs.

JUDGE PLUMMER: Go ahead.

MR. McMANUS: In terms of assignments, we have affirmatively alleged we have assignments.

JUDGE PLUMMER: From whom?

MR. McMANUS: From the townhome owners.

JUDGE PLUMMER: All 1,500?

MR. McMANUS: Not all 1,500, no, sir. That is a question of fact. We are talking about our pleadings here.

JUDGE PLUMMER: I am sorry. I might as well cut in on this because I am going to do something that nobody has asked me to do. But I think it is necessary to get this case moved along.

I look at this case somewhat at the present stage down there as Pandora's Box. I do not know what is in there. Nobody knows what is in there, at least none of the defendants nor the court knows what is in there.

I am going to do something which will open it up. I do not believe you have plead assignment or subrogation sufficiently because it is just a generality. About 15 townhouses, now. You cannot have the same exact assignment or subrogation on all 15 houses. Have you repaired all 15? Have you taken assignments from all 1,500? What right of subrogation would you have on those that you do not have assignments? There are number of things.

But I am going to, in lieu, of sustaining the demurrer on this issue of standing on assignments and subrogation, I am going to order the plaintiff to file an extensive bill of particulars which will serve two purposes. One, is advising who is getting sued for what, which is the primary purpose of the pleading. And secondly, it might eliminate a lot of extensive discovery. We have not gotten into discovery yet. I think this might help in both ways.

I am going to order a bill of particulars, and I am subject to suggestion as to various elements, but these

are the ones that I have considered and this is with reference to each townhouse you claim you have a right on. And that is, when did the plaintiff finish the construction on each townhouse, the full street address and town or city, or whatever it is, of each townhouse, when each townhouse was sold by Winchester, to whom was it sold, who is the present owner, do we have successors, when did the original owner take title, what was the date of that transfer.

Then we get to when had you inspected each townhouse, the results of that inspection showing whose plywood was used. And of course, you already alleged that certain defendants did the inspection and testing for various suppliers. I guess they could determine from that when you say who provided the plywood, they know who tested their plywood. If you are claiming assignment, a copy of the assignment on each townhouse where you claim you have standing by way of assignment.

With regard to your standing through subrogation, same thing except instead of a copy of the assignment, just how did you become subrogated. I guess that is a general thing. If you did not get an assignment from the townhouse owner, why do you have a right to pursue it any more than they do? I mean, usually in subrogation you give up your rights to the subrogee. And I do not know how you are going to show that, frankly, if you do not have an assignment.

Any way you can spell that out with the other information that I have ordered as far as the bill of particulars is concerned as to how you became and when did you become the subrogee.

MR. McMANUS: May I respond to that as part of our record-making procedure here, Judge?

JUDGE PLUMMER: Sure.

MR. McMANUS: First of all, I would suggest that the law of Virginia requires the clerk to accept the pleadings. This is not a motion to strike the plaintiff's evidence at the close of its case.

JUDGE PLUMMER: I said this was something unusual. This is an unusual case that has been put upon this court. It is extremely unusual, multiple defendants, some of which have absolutely nothing to do with each other, not a joint venture. They had no relationship whatsoever. They were competitors. They wanted to beat each other out.

I can sustain the demurrers on standing and you come back again and try again. And they are going to file another demurrer. And I may have to sustain it again. And we can keep going forever. That is why I am going to order a bill of particulars in lieu of an amended, giving broad information so that we can get perhaps to trial in February.

MR. McMANUS: I understand that, Judge. And all I'm suggesting is that's the appropriate means of getting the information that they are complaining of now. The pleadings themselves must be accepted as true. We have alleged assignment. We have alleged that the townhome owners, all of them, have provided us—

JUDGE PLUMMER: You do not have an assignment from each townhome owner against each of these defendants.

MR. McMANUS: We have over 1,200 assignments, Judge.

JUDGE PLUMMER: Fine, then you can tell them who you are making these claims against.

MR. McMANUS: Exactly. That is my point, your Honor. But that goes more to a bill of particulars than a demurrer.

JUDGE PLUMMER: That is what I am ordering.

MR. McMANUS: I understand that. So I would ask your Honor overrule the demurrers because on the face the four corners of the pleading—

JUDGE PLUMMER: All I am saying is I am doing this in lieu of sustaining the demurrers. This is another remedy to sustaining. Because I think we are going to get to the issue quicker this way.

I am using some extraordinary steps in a very extraordinary case.

MR. McMANUS: We will provide that information.

JUDGE PLUMMER: 30 days?

MR. McMANUS: I think we could probably do it sooner than that.

JUDGE PLUMMER: You can do it sooner than that. As soon as you want or as soon as you are capable of it.

You have to do 1,400 assignments showing when it was finished, when the purchaser got it, et cetera. It is going to take you time. So I will give you 30 days.

MR. McMANNUS: All right, sir.

JUDGE PLUMMER: Let us get on to the other one. So that probably—let us see what else we have here.

It would affect his second ground and that is identifying which wood was used in which townhouse. So that bill of particulars will cover his B grounds. The first one was A grounds. This is B grounds.

So that will take care of demurrer A and B.

McManus?

MR. McMANUS: Yes, sir, if I might just briefly speak to that. I understand your Honor's ruling.

I would just like to point out that we have alleged and will prove at trial that the product supplied by each of the defendants is inherently and uniformly defective. And they gave us a defective product. And no matter where it went into which roof, is irrelevant because it is going to degrade and require that that roof be replaced.

JUDGE PLUMMER: You may be able to prove that. But still, if you are taking an assignment, you can only recover against the person who provided the wood for that house.

MR. McMANUS: There is no question about that, Judge.

JUDGE PLUMMER: We may end up having a series of trials. Are you going to try all the cases against one defendant on those assignments and then go on to

the next defendant and try all those cases because I cannot see these being joint and several.

You have some people who did not supply wood for some of the townhouses.

MR. McMANUS: There is no question about that, Judge.

The question is those are issues of damages. Those are not issues of whether we have identified and clearly stated a cause of action against each of the defendants.

* * * *

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 93-1557

WINCHESTER HOMES, INC.,
Plaintiff-Petitioner,

v.

HOOVER UNIVERSAL, INC., *et al.*,
Defendants-Respondents.

PETITION FOR REHEARING

Petitioner Winchester Homes, Inc. ("Winchester"), by counsel, petitions the JUSTICES of this Court for rehearing of its Petition for Appeal which was refused by this Court on March 2, 1994.

On November 2, 1990, Winchester commenced this products liability lawsuit in the Circuit Court of Fairfax County to recover its damages as a result of its purchase of the defendants' defective products.

Winchester, a builder of residential homes, purchased the defendants' defective fire retardant treated plywood ("FRT plywood"), and before the defect became apparent installed it into the roofs of over 1,300 Virginia townhomes. Thereafter, Winchester received reports of the degradation of the FRT plywood, threatening the safety and structural integrity of the roofs. Winchester inspected and replaced the defective FRT plywood to avoid liability to townhome owners and to protect its reputation as a builder. It seeks as its compensatory and consequential damages the costs for this inspection and replacement.

In this case the trial court erroneously denied (on demurrer at the earliest pleadings stage of the case) plaintiff Winchester's standing to sue for its purchase of goods from the defendants, despite Winchester's absolute right to do so as mandated by the Legislature's enactment of the Uniform Commercial Code. The trial court erroneously eliminated hundreds of thousands of dollars of Winchester's recoverable damages by invading the province of the jury in making factual determinations (again at the pleadings stage and without discovery) as to which of defendants' advertising and sales-related statements were warranties of future performance and which were not, and by denying the recognized doctrine of equitable estoppel in making these statutes of limitations rulings. And the trial court dismissed, without discovery, allegations of fraud, not because the alleged statements of fraud were not specific enough or because the statements were not clearly attributable to the respective corporate defendants, but rather by interposing a new element for fraud not required by law, namely that a plaintiff, at the pleadings stage, must identify the specific person authorizing the statements made in *corporate* brochures and documents.

This Court has determined that none of the above is "reversible error." For the reasons set forth below, Winchester respectfully disagrees, and asks this Court to reconsider and change its prior decision.

Because of the recognized time constraints placed on appellate tribunals, they understandably often concentrate on core issues that, once decided, render unnecessary inquiry into any remaining assignments of error. In this case standing is such a core issue, for the trial court ruled at the beginning of the case that Winchester did not have standing in its own right (as purchaser of the defective FRT plywood), and, at the end of the case, that Winchester did not have standing as the assignee of the homeowners. It follows that if nobody has standing to

sue for a defective product, nothing else that happened in the case much matters. Therefore assuming, perhaps presumptuously but with no disrespect intended, that standing may have been such a core issue for this Court, Winchester will concentrate its discussion on that issue. It is also the clearest example of reversible error.

In examining whether or not reversible error was committed by the trial court's rulings on standing, the analysis must focus on two factors: what did Winchester plead in its motion for judgment, and what is the law of Virginia, as mandated by the legislature. Proper consideration of these two factors establishes that reversible error was committed by the trial court.

I. *Winchester's Pleadings*

In two recent cases, this Court observed that with increasing frequency trial courts are short-circuiting litigation pre-trial, deciding disputes without permitting the parties to reach trial on the merits. *Renner v. Stafford,* 245 Va. 351 (1993), *Catercorp, Inc. v. Catering Concepts, Inc.,* 246 Va. 22 (1993). In *Renner,* a case dismissed on summary judgment, this Court reiterated the long-standing rule that a court "must adopt those inferences from the facts that are most favorable to the nonmoving party, . . . the trial court is not permitted to adopt inferences from the facts that are most favorable to the moving party." *Renner* at 353. The trial court's dismissal was reversed because the medical evidence supporting the plaintiff's theory of the case had not been fully developed. Paying deference to the plaintiffs pleadings, this Court allowed that the plaintiff was entitled to attempt to prove the case she plead.

In *Catercorp* this Court reiterated Virginia's longstanding rule that

> A demurrer admits the truth of all material facts properly pleaded. Under this rule, the facts admitted are those expressly alleged, those which fairly

> can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged. When a motion for judgment or a bill of complaint contains sufficient allegations of material fact to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer. And even though a motion for judgment or a bill of complaint my be imperfect, when it is drafted so that the defendant cannot mistake the true nature of the claim the trial court should overrule the demurrer. . . .

246 Va. at 24.

Examination and reiteration of these basic legal principles relating to pleading is necessary here because they are no less applicable to Winchester than they were to the *Renner* and *Catercorp* plaintiffs, or any other litigant who comes before a Virginia court.

Somehow and in some way what Winchester plead in its lawsuit has been lost or ignored, and its case twisted into something wholly different from that plead by it. The trial court, not Winchester, made this into a case about the purchase and/or ownership of townhomes instead of FRT plywood. And it was the trial court that denied Winchester's standing in its own right, forcing it to proceed as assignee of townhome owners.[1]

Winchester can only surmise that the focus of the case was shifted from its purchase of the defective FRT ply-

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[1] On JNOV the jury verdict against Hoover Treated was set aside. Because Winchester had been forced to proceed as assignee of the homeowners, the trial court erroneously shifted the focus of the case from Winchester's purchase of a good, the FRT plywood, to the homeowners' purchase of a townhome. Had Winchester's original pleadings been accorded as they were entitled to be, this unnecessary shifting of focus could not have occurred. The JNOV ruling serves only to magnify the original error of denying Winchester standing in its own right.

wood to the townhomes because the townhomes became so integral to other issues in the case, thus leading to confusion about the correct subject of Winchester's cause of action. For example, the *measure* of Winchester's compensatory and consequential damages as allowed by the UCC was based on the cost to inspect and repair each individual townhome, therefore each townhome had to be considered; townhomes became significant because that is where the defendants' goods ended up, so it was necessary to identify the townhomes to determine the extent of each defendants' liability, and because products of multiple defendants were often found in individual townhomes, another factor in determining the extent of each defendants' liability; and the trial courts rulings on the statute of limitations drew a line through the total universe of houses in the litigation, so that those townhomes containing FRT plywood built on one side of that line were still in the case, while those built with FRT plywood on the other side were out.

While the trial courts apparent confusion may be understandable, it is legally and intellectually void.

Winchester's pleadings were improperly ignored. Winchester sued to recover damages for *its* purchase of *goods* from the defendants. More specifically, in its original motion for judgment Winchester alleged that:

> 23. Plaintiff is, and at all times relevant hereto, was engaged in the business of developing and constructing residential properties, including townhomes, which are subsequently sold to homebuyers.
>
> 26. Beginning in 1983, plaintiff purchased FRT plywood for use as fire retardant roof sheathings in the construction of the roofs of at least 1,400 residential buildings it developed, constructed, and subsequently sold to homebuyers throughout Fairfax County and the Commonwealth of Virginia.
>
> 27. Upon information and belief, FRT plywood purchased and used by plaintiff in the building and

construction of townhomes was developed, manufactured, produced, tested, inspected, marketed, sold and distributed by defendants Hoover, Hoover Universal, Ply-Gem Industries, Johnson, Osmose, Applied Research, Hickson USA Corporation, Hickson International, Inc., A.C. Chemical, Reliance, Mid Atlantic, Allied, Chesapeake and Timber Products (hereinafter all defendants will be collectively referred to as "the defendants").

29. The FRT plywood used by plaintiff in the construction of many of the roofs in the residences it built has begun to degrade and deteriorate, significantly weakening the roofs and resulting in substantial impairment of the strength and structural integrity of the roofs. Because of the degradation and deterioration of the FRT plywood, the roofs are, or will soon become, unsafe and dangerous, threatening the safety of the occupants of the homes and any other persons who may have cause to be on the roofs.

30. In order to return the residences to a safe condition, FRT plywood used to construct the roofs must be replaced and the roofs repaired. In addition, the roofs of the homes built by plaintiff throughout Fairfax County and the Commonwealth of Virginia, which contain FRT plywood, must be inspected to determine the extent of the degradation and deterioration.

61. At the time the FRT plywood was sold and delivered to plaintiff, defendants impliedly warranted that the FRT plywood purchased by plaintiff was merchantable and fit for the ordinary purposes for which it was to be used and for which it was designed, specifically, to provide durable roof sheathing for the roofs of the residences built by plaintiff.

62. Plaintiff relied on the implied warranties of defendants when it purchased FRT plywood and

used it as fire retardant roof sheathing in the construction of the roofs of the residences it built and subsequently sold to homebuyers.

63. Defendants breached said warranties in that the FRT plywood sold and delivered to plaintiff was not merchantable or reasonably fit for use as a roofing member. Specifically, defendants breached said warranties in ways which include, but are not limited to, selling and distributing FRT plywood to plaintiff which, under normal conditions, usage, and applications, was likely to degrade and deteriorate, resulting in the substantial impairment of the strength and structural integrity of the roofs in which it was used, and rendering the FRT plywood defective as roof sheathing.

64. As a direct and proximate result of the breach of the implied warranties by defendants, plaintiff has incurred and will continue to incur damages which include, but are not limited to, costs to inspect the roofs constructed with defendants' FRT plywood, to notify the affected homeowners, to replace and repair the affected roofs, and to restore the affected residences to a safe condition.

65. As a further direct and proximate result of the breach of implied warranties by defendants, plaintiff has suffered and will continue to suffer irreparable harm to its business reputation in the housing development industry and in the homebuying community.

It is these facts, pursuant to *Renner, Catercorp,* and longstanding Virginia law, that the trial court was *required* to accept. This case is about the purchase of plywood, not townhomes. If the nature of the degradation of the FRT plywood had become known to Winchester before it was used in the townhome construction, would anyone seriously contend that Winchester did not have

standing to sue? Of course not,[2] and the discussion below explains why Winchester's use of the FRT plywood in no way affects its standing to sue the defendants for their defective products.

II. *Virginia Law*

When analyzing a challenge to standing, the focus is on the party, and not the party's claim. The Virginia Supreme Court has recognized that "standing to maintain an action is a preliminary jurisdictional issue having no relation to the substantive merits of an action." *Andrews v. American Health and Life Ins.*, 236 Va. 221, 226, 372 S.E.2d 399, 402 (1988). "The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.'" *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 484 (1982) (quoting *Flast v. Cohen,* 392 U.S. 83, 99 (1968)). "Perhaps the most fundamental aspect of the standing doctrine is that it focuses on the particular plaintiff seeking to bring his claim before the federal court, not on the issues or merits of the case." *O'Hair v. White,* 675 F.2d 680, 685 (5th Cir. 1982).

Standing is concerned with the concept of a need to establish an entitlement to judicial action, separate from proof of the substantive merit of the claim advanced. "At times courts are tempted to draw from standing de-

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[2] The trial court implicitly agreed with this in its April 16, 1993 Opinion letter's analysis of the UCC, and defendant Hoover Treated, in its Reply Brief for its Motion for JNOV, flat out admits it: "HTWP agrees that a 'buyer' has standing to sue under the UCC . . . ('buyer' means a person who buys or contracts to buy goods). Indeed, if Winchester was the 'buyer' whose rights were litigated in this action, *it would have standing to sue.*" (at 2) (emphasis added). Winchester is the buyer whose rights should be litigated in this action. This is further supported by the jury's finding that Hoover had made and violated warranties to *Winchester.*

cisions in addressing such matters as the existence of a cause of action, identification of the real party in interest, capacity, intervention, and even the procedural rights of bankruptcy. Although such decisions may be aided by reference to standing doctrine, they involve other matters that will not be considered here." 13 Charles A. Wright, *et al., Federal Practice and Procedure* § 3531 (1984).

"Standing is a threshold inquiry; it requires focus on the party seeking to have his complaint heard in a federal court; and it eschews evaluation of the merits. The court is not to consider the weight or significance of the alleged injury, only whether it exists." *Coalition for the Env't v. Volpe,* 504 F.2d 156, 168 (8th Cir. 1974). There should be no confusion between the sufficiency of proof for a claim with the adequacy of an asserted interest. *Georgia Ass'n of Retarded Citizens v. McDaniel,* 716 F.2d 1565, 1572, *reh'g denied,* 721 F.2d 822 (11th Cir. 1983), *vacated on other grounds,* 468 U.S. 1213 (1984).

Winchester's standing is determined only by whether or not it "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Duke Power Co. v. Carolina Envt'l Study Group,* 438 U.S. 59, 72 (1978).

The Virginia General Assembly has established Winchester's standing in this case, and the trial court's ruling that Winchester lacked standing because it no longer owned the FRT plywood is reversibly erroneous. The Virginia Code defines a "buyer" as "a person who buys or contracts to buy goods" § 8.2-103(1)(a), and "goods" are defined as "all things . . . which are moveable at the time of identification to the contract for sale. . . ." Va. Code Ann. § 8.2-105(1). It is undisputed that at the time of purchase Winchester was a "buyer" and the FRT plywood was a "good" within the meaning of the Virginia Code.

As a buyer of goods, Winchester is entitled to recover for damages for breach of warranty,[3] including incidental and consequential damages, Va. Code Ann. §§ 8.2-714, 715, *i.e.*, the costs associated with the inspection and repair of the townhome roofs necessitated by the defective FRT plywood.

The fact that Winchester purchased the goods for incorporation into the townhome roofs does not remove that original purchase transaction from the scope of the UCC. The Virginia Code states that "each provision of this title with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies *irrespective of title to goods* except where the provision refers to such title," Va. Code Ann. § 8.2-401 (emphasis added), and neither the definition of a buyer nor the other provisions applicable to Winchester's purchase make any reference to title of the goods. In fact, the Code contemplates that a buyer may resell goods, and expressly allows consequential damages for any loss after resale. Va. Code Ann. § 8.2-715(2)(a) cmt. 6 (1992). See also Ronald A. Anderson, *The Uniform Commercial Code* § 2-103:6 (3d ed. 1981); *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102 (4th Cir. 1980); *Westcott-Alexander, Inc. v. Dailey*, 264 F.2d 853 (4th Cir. 1959); *Step-Saver Data Sys. v. Wyse Tech.*, 912 F.2d 643 (3rd Cir. 1990).

In the face of such unmistakable standing rights granted by the Legislature, it was reversible error for the trial court to deny Winchester's standing.[4] Indeed, the reversi-

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[3] The issue of whether or not a warranty was made and, if so, whether that warranty was breached is a question of fact for the jury. *Medcom, Inc. v. C. Arthur Weaver Co., Inc., et al.*, 232 Va. 80 (1986). This maxim is no less applicable to warranties of future performance, the trial courts determination of which constitutes another instance of reversible error.

[4] From that flowed the other reversible errors Winchester raised in its Petition for Appeal, but which are not discussed here because of space limitations.

ble error is so great as to violate Winchester's due process rights pursuant to Article I, Section 11 of the Constitution of Virginia and the 14th Amendment to the Constitution of the United States.

A cause of action for damages is a property right and cannot be taken without due process. *In Re Real Estate Title and Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 765 (3rd Cir. 1989) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). And while a litigant is not entitled to any particular result, he or she is guaranteed the substantial right to redress by some effective procedure. *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1993). Here, because of the denial of standing Winchester has been deprived of any procedure by which to proceed with its cause of action, a cause of action authorized by the General Assembly. Winchester does not raise this due process argument (nor the separation of powers argument discussed below) as new grounds of appeal, but simply points them out to demonstrate to the Court *why* the actions of the trial court constitute reversible error.

The trial court's action also violates the Separation of Powers principal so fundamental to our tripartite system of government. Article I, Section 5 suggests, and Article III, Section 1 of the Constitution of Virginia mandates, that the "legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than any of them at the same time." Article IV, Sections 14 and 15 of the Constitution of Virginia provide that, "the authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted," and that, "[i]n all cases enumerated in the preceding section, and in every other case which, in its judgment, may be provided for by general laws, the General Assembly shall enact general laws." Article I, Section 7 states that, "[a]ll power of suspending

laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."

No such power or authority to make or suspend law is granted to the judiciary, with one exception: the Constitution of Virginia grants the Supreme Court appellate jurisdiction in cases involving determination of the constitutionality of a law. The constitutionality of the applicable provisions of the UCC are not at issue in this case, however, and therefore neither the trial court nor this Court has the power or authority to ignore the provisions of law enacted by the legislature. As this Court has recognized that a court's attempt to amend an ordinance and reduce a jail term violates the separation of powers, *Boyles v. City of Roanoke,* 179 Va. 484 (1942), neither can a court deprive a litigant of its rightful standing [5] as provided by the General Assembly.

By suggesting that there is no reversible error, this Court is accepting the trial court's express rejection of the sole authority of the legislature to make the law of Virginia, and by doing so has denied Winchester's access to the court system. This access is guaranteed by the constitutions of Virginia and the United States and is a fundamental right, the denial of which must be recognized as reversible error.

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[5] The trial court also ignored longstanding Virginia law on subrogation when it made its standing decision. In *Morgan v. Gollehon,* 153 Va. 246, 249, 149 S.E. 485, 486 (1929), this Court recognized that subrogation arises where one pays a debt out of the necessity of self-protection. To avoid liability and to protect its reputation as a builder, Winchester inspected and repaired the roofs, thereby discharging the debt owed by defendants to the homeowners. As a result, a subrogation claim arose in Winchester's favor. The trial court again disregarded Winchester's pleadings. When ruling on the demurrers, the Circuit Court was obligated to accept as true Winchester's allegations of injury to itself, involving lost profits and damages to inspect and repair roofs. These allegations were sufficient to establish Winchester's standing by way of subrogation.

III. *Conclusion*

The judgment below produces an extraordinary result. Defendants' FRT plywood has been found defective. The jury below considered the evidence and found in favor of Winchester. Yet the trial court's rulings have allowed the manufacturers and sellers of this FRT plywood to avoid liability in tort, contract and by statute. The FRT plywood buyer, consumer, and user are without any remedy under Virginia law. This is directly contrary to the General Assembly's express intent to promote fair and ethical standards of dealings between suppliers and the consuming public. See Va. Code Ann. § 59.1-197.

Contrary to the suggestion of the trial court, this is not a matter for action by the legislature. The legislature long ago did its job by providing a remedy for claims like Winchester's. Now the judiciary must allow Winchester its rightful opportunity to enforce that right by trying the case it plead. Winchester's pleadings were ignored, and denial of Winchester's standing in its own right was reversible error. Winchester respectfully requests that its Petition be accepted.

Respectfully submitted,

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VIRGINIA

IN THE CIRCUIT COURT
OF FAIRFAX COUNTY

At Law No. 100865

WINCHESTER HOMES, INC.,
Individually and as Successor
in Interest to Scarborough
Corporation, Virginia Division,
Plaintiff,

v.

HOOVER UNIVERSAL, *et al.*
Defendants.

HOOVER'S REPLY IN FURTHER SUPPORT OF ITS APPLICATION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL

McCARTER & ENGLISH, ESQS.
Four Gateway Center
100 Mulberry Street
(201) 622-4444
Hoover Treated Wood
Products, Inc.

* * * *

ARGUMENT

I. WINCHESTER, AS ASSIGNEE OF THE 173 HOMEOWNERS, CANNOT SUE FOR BREACH OF WARRANTY UNDER THE UNIFORM COMMERCIAL CODE.

To avoid a judgment notwithstanding the verdict in favor of HTWP, Winchester claims that the applicability of the Uniform Commercial Code ("UCC") depends upon the sale of FRT plywood from HTWP to Winchester. (Winchester Brief at 2-3). Claiming that it was the "buyer" of HTWP's FRT plywood, Winchester contends that it has "standing the (sic) sue." (Winchester Brief at 3). HTWP agrees that a "buyer" has standing to sue under the UCC. Va. Code Ann. § 8.2-103 ("buyer" means a person who buys or contracts to buy goods). Indeed, if Winchester was the "buyer" whose rights were litigated in this action, it would have standing to sue. Winchester, however, was not the "buyer" whose rights were litigated. As stated by this Court, "Winchester is before the Court as the assignee of the homeowners." (November 12, 1992 transcript at 47; Exhibit A). As an assignee, Winchester merely litigated the rights of the homeowners. *See Fidelity & Cas. Co. of N.Y. v. First Natl. Exc.*, 193 S.Ed.2d 678, 684 (Va. 1973).[1]

Because the homeowners were the "*buyers*" whose rights were litigated, this Court must determine the applicability of the UCC from their perspective, *not* Winchester's. This point is keenly illustrated by the following cases which were discussed in Point I

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[1] Recognizing the constraints that accompany its rights as assignee, Winchester attempts to expand the scope of its legal authority by asserting that it has "standing not only as assignee, but as subrogee and indemnitee." (Winchester Brief at 2). This is wrong. Judge Plummer's October 9, 1992 Order made clear that Winchester could proceed to trial *only* as a subrogee or indemnitee if it had repaired or replaced a roof prior to September 16, 1991. (Exhibit B). Of the 173 roofs at issue in this case, not one had been repaired or replaced by September 16, 1991. Accordingly, Winchester proceeded to trial as assignee of the homeowners and nothing more.

ADDENDUM OF RELEVANT VIRGINIA STATUTES

§ 8.2-103. Definitions and index of definitions.—

(1) In this title unless the context otherwise requires

(a) "Buyer" means a person who buys or contracts to buy goods.

(b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

(c) "Receipt" of goods means taking physical possession of them.

(d) "Seller" means a person who sells or contracts to sell goods.

§ 8.2-105. Definitions: Transferability; "goods"; "future" goods; "lot"; "commercial unit."—(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Title 8.8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (§ 8.2-107).

§ 8.2-401. Passing of title; reservation for security; limited application of this section—Each provision of this title with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title.

§8.2-714. Buyer's damages for breach in regard to accepted goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of § 8.2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section [8.2-715] may also be recovered. (1964, c. 219.)

§8.2-715. Buyer's incidental and consequential damages.—

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

No. 94-90

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

WINCHESTER HOMES, INC.,
Petitioner,

v.

HOOVER UNIVERSAL, INC., *et al.*,
Respondents.

Petition For Writ Of Certiorari To The Circuit Court Of Fairfax County, Virginia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Where no federal question has been presented to or decided by the state courts below, may this Court properly exercise jurisdiction pursuant to 28 U.S.C. §1257?

2. Where the ruling of the state court presented for review does not create or perpetuate a split of authority upon a question of federal law, and where the ruling does not give rise to a federal question of overriding importance, should this Court grant review?

LIST OF PARTIES TO THE PROCEEDING

Petitioner Winchester Homes, Inc. was the plaintiff in the Circuit Court of Fairfax County, Virginia, the court whose judgment is sought to be reviewed.

Respondents Hoover Universal, Inc.; Johnson Controls, Inc.; Ply-Gem Industries, Inc.; Reliance Wood Preserving, Inc.; Mid-Atlantic Wood Preservers, Inc.; Hoover Treated Wood Products, Inc.; Allied Plywood Corporation; and Jarvis Steel and Lumber Co., Inc. were named as defendants in the Circuit Court of Fairfax County, Virginia, along with McCoy Lumber Company; Chesapeake Corporation; Applied Research Group, Inc.; Hickson International Corporation; Hickson U.S.A. Corporation; Osmose Wood Preserving, Inc.; and A.C. Chemical Corp.

Respondents Hoover Universal, Inc.; Johnson Controls, Inc.; Ply-Gem Industries, Inc.; Reliance Wood Preserving, Inc.; Mid-Atlantic Wood Preservers, Inc.; Hoover Treated Wood Products, Inc.; and Jarvis Steel and Lumber Co., Inc. have no parent or non-wholly owned subsidiary companies to list pursuant to this Court's Rule 29.1. Respondent Allied Plywood Corporation's parent company is A-Wood, Inc. Allied Plywood has no non-wholly owned subsidiaries to list pursuant to this Court's Rule 29.1.

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IN THE

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October Term, 1994

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Petitioner,

v.

HOOVER UNIVERSAL, INC., *et al.*,

Respondents.

Petition For Writ Of Certiorari To The Circuit Court Of Fairfax County, Virginia

BRIEF IN OPPOSITION

Respondents Hoover Universal, Inc., *et al.*, respectfully request that the Petition for a Writ of Certiorari be denied.

CITATION OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The rulings of the Circuit Court of Fairfax County, Virginia that petitioner Winchester Homes, Inc. seeks to have reviewed are unreported. *See* App. to Pet. for Cert. 3a, 8a, 19a.

The order of the Supreme Court of Virginia finding no reversible error and refusing to grant discretionary review of Winchester's appeal is unreported. *See id.* 1a. The order of the Supreme Court of Virginia denying Winchester's Petition for Rehearing also is unreported. *See id.* 2a.

GROUND ON WHICH THIS COURT'S JURISDICTION IS INVOKED

Winchester seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. §1257(a). For the reasons explained herein, this Court lacks jurisdiction over Winchester's Petition for a Writ of Certiorari.

STATUTORY PROVISION INVOLVED

Whether this Court may properly exercise jurisdiction over this case implicates 28 U.S.C. §1257(a). That statute provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

Winchester is a builder of residential homes. From 1981 to 1988, it purchased fire retardant treated plywood manufactured or supplied by one or more of the respondents and others. During that time, Winchester integrated the plywood into the roofs of certain homes that Winchester was building in Virginia. Winchester then sold these homes to various purchasers.

On November 2, 1990, long after Winchester had sold all homes containing the plywood at issue, Winchester brought suit against the respondents who have joined in this Brief in Opposition, and others, in the

Circuit Court of Fairfax County, Virginia claiming that the plywood was defective. Winchester's claims arose exclusively under Virginia state law.

Upon the demurrers of the respondents who have joined in this Brief in Opposition and the other defendants, the Virginia state trial court dismissed all of Winchester's claims, concluding that Winchester lacked standing to assert the claims. Specifically, the trial court ruled that Winchester could not bring a product liability suit in its own right to recover for damages that parties other than Winchester, such as the homeowners, may suffer or have suffered. The trial court's decision that Winchester lacked standing to prosecute its own claims was based wholly upon the trial court's understanding of Virginia law.

Thereafter, the trial court allowed Winchester to assert various claims against respondents as the express assignee and/or subrogee of certain homeowners who had purchased homes containing the allegedly defective plywood. Winchester then obtained such assignments. Later, relying on various state law grounds including expiration of the applicable statutes of limitations, the trial court dismissed all such claims against respondents except one. The remaining claim was Winchester's claim on behalf of the homeowners against Hoover Treated Wood Products, Inc. arising under Article 2 of Virginia's version of the Uniform Commercial Code for breach of warranty.

Winchester took the homeowners' U.C.C. claims against Hoover Treated to trial, where a jury awarded Winchester a verdict totaling $434,185. Following trial, Hoover Treated filed a motion for judgment notwithstanding the verdict. The trial court granted Hoover Treated's motion, ruling as a matter of Virginia law that the homeowners, whose claims were being asserted by Winchester, had no claim under the U.C.C. The trial court reasoned that Article 2 of the U.C.C. concerns itself with the sale of goods, whereas the homeowners

did not purchase goods, but rather realty. The homeowners never purchased plywood when they purchased their homes, as the plywood had already been integrated into the realty.[1]

Once Winchester's suit against all defendants had been disposed of in the trial court, Winchester filed a petition in the Supreme Court of Virginia seeking leave to appeal. As Winchester correctly explains in its Petition for a Writ of Certiorari, "Virginia has no automatic right of appeal in general civil cases such as Winchester's." Pet. for Cert. 5 n.7.

Nowhere in Winchester's Petition for Appeal filed in the Supreme Court of Virginia did Winchester assert that the trial court's rulings denied Winchester's right to due process under the Fourteenth Amendment to the United States Constitution. Instead, Winchester limited its argument in its Petition for Appeal to the contention that the trial court's rulings were erroneous as a matter of state law. In an order dated March 2, 1994, the Supreme Court of Virginia, perceiving no reversible error, refused Winchester's Petition for Appeal. *See* App. to Pet. for Cert. 1a.

Thereafter, Winchester filed a Petition for Rehearing in the Supreme Court of Virginia asking that court to

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1. Winchester maintains that the trial court ruled that Winchester lacked standing to assert claims arising under the U.C.C. as the assignee of townhome purchasers. *See* Pet. for Cert. 4-5. Winchester's assertion mischaracterizes the trial court's ruling.

The trial court ruled, as a matter of substantive Virginia law, that Article 2 of Virginia's version of the U.C.C. allows only claims involving goods, not realty. The state court further ruled that one who purchases a townhome whose roof contains plywood does not purchase plywood as a good but rather purchases realty. Accordingly, the trial court determined as a matter of substantive law that Virginia's version of the U.C.C. does not confer upon the purchaser of *a home* a claim that plywood contained in the home's roof is allegedly defective. Such a ruling does not implicate standing; rather, the trial court held that the homeowners, and Winchester as their assignee, failed to state a claim upon which relief can be granted under Article 2 of the U.C.C.

reconsider its order refusing Winchester's Petition for Appeal. *See id.* 31a-43a. In the Petition for Rehearing, Winchester suggested for the first time that the trial court's dismissal of Winchester's claims, if upheld, might arguably constitute a deprivation of Winchester's right to due process under the Fourteenth Amendment to the United States Constitution. *See id.* 40a-41a.

Specifically, Winchester wrote:

> "In the face of such unmistakable standing rights granted by the [Virginia] Legislature, it was reversible error for the trial court to deny Winchester's standing. Indeed, the reversible error is so great as to violate Winchester's due process rights pursuant to Article I, Section 11 of the Constitution of Virginia and the 14th Amendment to the Constitution of the United States.
>
> "A cause of action for damages is a property right and cannot be taken without due process. And while a litigant is not entitled to any particular result, he or she is guaranteed the substantial right to redress by some effective procedure. Here, because of the denial of standing Winchester has been deprived of any procedure by which to proceed with its cause of action, a cause of action authorized by the [Virginia] General Assembly. *Winchester does not raise this due process argument (nor the separation of powers argument discussed below) as new grounds of appeal*, but simply points them out to demonstrate *why* the actions of the trial court constitute reversible error." App. to Pet. for Cert. 40a-41a (citations and footnote omitted; emphasis added).

Winchester thus made clear that while the Petition for Rehearing contained the first mention of due process, the argument was not even then being "raised" as a ground for appeal. *See id.*

On April 15, 1994, the Supreme Court of Virginia issued an order denying Winchester's Petition for Rehearing. The order stated, in full:

> "On consideration of the petition of the appellant to set aside the judgment rendered herein on the 2nd day of March, 1994 and grant a rehearing thereof, the prayer of the said petition is denied." *Id.* 2a.

On July 14, 1994, Winchester filed its Petition for a Writ of Certiorari in this Court. Therein, Winchester argues that the Virginia courts' rulings denied Winchester its rights to procedural and "substantive" due process in violation of the Fourteenth Amendment to the United States Constitution by denying Winchester access to the courts.[2]

ARGUMENT

I. The Court Lacks Jurisdiction Over This Case

A. Winchester failed to raise, and the state court did not consider, Winchester's federal due process argument

Winchester failed to preserve in the state courts of Virginia the federal questions presented in its Petition for a Writ of Certiorari. As a result, this Court lacks

---

2. Winchester's Petition for a Writ of Certiorari incorrectly seeks issuance of the writ to the Supreme Court of Virginia. The Supreme Court of Virginia, however, refused to grant discretionary review of the rulings of the Circuit Court of Fairfax County, Virginia. Both 28 U.S.C. §1257(a) and this Court's rulings, *see, e.g.*, *Virginian Ry. Co. v. Mullens*, 271 U.S. 220, 222 (1926), make clear that a writ of certiorari can issue only to "the highest court of a State in which a decision could be had." Here, due to the Supreme Court of Virginia's declining review, the highest court of Virginia in which a decision could be had upon Winchester's suit is the Circuit Court of Fairfax County, Virginia.

jurisdiction pursuant to 28 U.S.C. §1257(a) to review the judgment of the state court.

Winchester argues in its Petition for a Writ of Certiorari that the trial court's dismissal of its claims against respondents constituted a denial of Winchester's right to due process of law under the Fourteenth Amendment to the United States Constitution. Winchester did not raise this argument in the trial court. Winchester certainly could have raised this argument in its Petition for Appeal filed in the Supreme Court of Virginia but, for whatever reason, failed to do so.

Indeed, Winchester expressly disclaimed that it even intended belatedly to raise the due process argument in Winchester's Petition for Rehearing filed in the Supreme Court of Virginia. *See* App. to Pet. for Cert. 41a.

The record before this Court compels the conclusion that Winchester's federal due process argument was neither raised nor considered by the Virginia state courts. *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) ("when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary") (internal quotations omitted); *see also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (same); *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974) (same); *Street v. New York*, 394 U.S. 576, 582 (1969) (same).

As a result, this Court lacks jurisdiction pursuant to 28 U.S.C. §1257(a) to review the judgment of the Virginia state court. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (dismissing writ of certiorari for lack of jurisdiction where "the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below").

This Court should therefore deny Winchester's Petition for a Writ of Certiorari.

B. Even if Winchester could be deemed to have raised a federal due process argument in its Petition for Rehearing filed in the Supreme Court of Virginia, the argument was raised too late to be preserved for this Court's review

Even if Winchester's Petition for Rehearing filed in the Supreme Court of Virginia could be read as having raised, albeit for the very first time, an argument that the trial court's rulings denied Winchester's federal right to due process, the argument was raised too late to have been preserved for this Court's review.

In *Herndon v. Georgia*, 295 U.S. 441, 443 (1935), this Court explained that "[t]he long established rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

Similarly, in *Godchaux Co. v. Estopinal*, 251 U.S. 179 (1919), this Court held:

> "The settled rule is that in order to give us jurisdiction to review the judgment of a state court upon writ of error the essential federal question must have been especially set up there at the proper time and in the proper manner; *and further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point*." *Id.* at 181 (emphasis added).

And, in *McCorquodale v. Texas*, 211 U.S. 432 (1908), this Court explained:

> "This court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a State after that court has pronounced its final decision. It is true that we have also decided that if the

> court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the court has done so. It can hardly be said to so appear in the case at bar. The order of the court is nothing more than the denial of the motion. In other words, it expresses no more than would be implied from a simple denial of the motion." *Id.* at 437 (citations omitted).

Accordingly, this Court in *McCorquodale* dismissed the writ of error due to the failure of the plaintiff in error properly to preserve a federal question for this Court's review.

Here, Winchester is in the same position as the plaintiff in error in *McCorquodale*. Winchester is unable to demonstrate that the Supreme Court of Virginia, in denying Winchester's Petition for Rehearing, passed upon the merits of Winchester's federal due process argument, which was raised (if at all) for the first time in Winchester's Petition for Rehearing.[3]

In light of this Court's decisions holding that it is too late for a party to preserve for this Court's review a federal issue raised for the very first time in a petition for rehearing, where the petition does not precipitate a ruling on the merits of the federal issue, this Court should deny Winchester's Petition for a Writ of Certiorari. The record in this case is clear that Winchester has failed to preserve for this Court's review the questions presented in its Petition for a Writ of Certiorari.

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3. Indeed, the Supreme Court of Virginia is prohibited by its own rules of appellate procedure from passing upon the merits of an assignment of error raised for the first time in a rehearing petition. Rule 5:17(c) provides that "[o]nly errors assigned in the petition for appeal will be noticed by this Court." Va. Supr. Ct. R. 5:17(c). Because Winchester did not assign as an error in its Petition for Appeal the trial court's alleged denial of Winchester's right to due process under the Fourteenth Amendment, the Supreme Court of Virginia was prohibited on rehearing from considering the merits of Winchester's fleeting assertion that the trial court's rulings operated to deny Winchester's federal right to due process.

II. The Questions Presented Do Not Merit This Court's Attention

Even if Winchester had preserved its federal due process arguments by asserting these points at the appropriate times while this case was pending in the state court system, this case would still not be appropriate for review on writ of certiorari.

This Court's Rule 10 explains that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Rule 10 proceeds to explain that such reasons may be found to exist where a state court's ruling creates or perpetuates a split of authority regarding a matter of federal law or where a case gives rise to a federal question of overriding importance.

The decisions from which Winchester is aggrieved do not meet any of these criteria. The rulings of the Circuit Court of Fairfax County, Virginia do not create or perpetuate any conflict of authority regarding a matter of federal law.[4] Furthermore, while the trial court's rulings

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4. Winchester states in its Petition for a Writ of Certiorari that a split of authority exists among United States Courts of Appeals concerning whether access to the courts should be recognized as a right protected by "substantive" due process. Pet. for Cert. 13-22. Regardless of whether Winchester's assertion of a circuit split is true, in this case the courts of Virginia have not addressed whether access to the courts is a right protected by "substantive" due process. Accordingly, this case does not perpetuate the suggested split and, thus, is not an appropriate vehicle for resolving the split of authority, if indeed one actually exists.

It also deserves to be noted that Winchester's attempt to enlarge the rights afforded to state court litigants under the Fourteenth Amendment does not stop with Winchester's seeking to have this Court recognize a substantive right of access. In footnote 12 on page 12 of its Petition for a Writ of Certiorari, Winchester asserts that the state trial court's grant of judgment notwithstanding the verdict in favor of Winchester's adversary following trial "deprived [Winchester] of its right under the Seventh Amendment to have a jury decide the merits of its claim." Pet. for Cert. 12 n.12. Winchester's argument overlooks that this Court has held that the

as to matters of Virginia law are of importance to Winchester, those rulings do not give rise to any federal question of overriding importance.[5]

Winchester's Petition for a Writ of Certiorari seeks review of a Virginia state trial court's rulings construing Virginia's Uniform Commercial Code and applying Virginia law governing when a litigant has standing to assert claims. In its Petition for a Writ of Certiorari, Winchester tries valiantly to make a federal case out of a Virginia state trial court's rulings upon matters limited purely to Virginia law. No amount of effort or creativity, however, can make this case worthy of review by the Supreme Court of the United States.[6]

As a result, this Court should deny Winchester's Petition for a Writ of Certiorari.

Seventh Amendment of the United States Constitution does not apply to trials conducted in state courts. *See Minneapolis & S.L. R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) ("the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatsoever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same"); *see also Hattaway v. McMillian*, 903 F.2d 1440, 1451 n.16 (CA11 1990) ("the seventh amendment does not apply to state court proceedings").

5. Respondents disagree with Winchester's assertions that the trial court's rulings are incorrect as a matter of Virginia law. However, mindful of the fact that this Court does not sit as the final arbiter of Virginia law, respondents will forego a recitation of the reasons why the trial court's rulings are correct as a matter of state law. It should suffice for present purposes to note that the actual final arbiter of Virginia law, the Supreme Court of Virginia, was apparently not impressed with Winchester's arguments under state law that the trial court's rulings were erroneous and accordingly denied Winchester's Petition for Appeal.

6. In any event, Winchester's argument that it has been denied access to the Virginia state courts rings hollow. The trial court permitted Winchester to amend and re-amend its pleadings numerous times in an attempt to state viable claims. Winchester took its U.C.C. claim against respondent Hoover Treated Wood Products, Inc. to trial and, thereafter, to verdict. Even if Winchester possessed a Fourteenth Amendment right of access to the courts, the record does not support Winchester's assertion that its right of access has been denied.

CONCLUSION

For the foregoing reasons, this Court should deny Winchester's Petition for a Writ of Certiorari.

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---

REPLY BRIEF OF PETITIONER

Respondents largely ignore the merits, while suggesting erroneously that Winchester Homes, Inc.'s ("Winchester")[1] Petition should be denied for two reasons: (1) that the federal issues implicated in this case were not presented below; and (2) that these issues do not warrant this Court's consideration. Despite Respondents' misguided assertions on these issues, however, the following is clear:

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[1] Winchester respectfully refers the Court to its Petition for a Writ of Certiorari for its Rule 29.1 Statement. Pet. for Cert. at ii.

1. Winchester raised the federal issues implicated in this case. App. to Pet. for Cert. at 31a-43a.[2]

2. The Respondents have ignored the fact that the standing issue was the first Assignment of Error presented to the Supreme Court of Virginia, wherein Winchester argued that the synergistic effect of the trial court's pre-trial and post-trial rulings not only deprived Winchester of standing, and thus access to the courts, but also deprived any other affected party standing to seek redress for a product already determined by a jury to be defective. As Respondents' own Brief in Opposition states, the Supreme Court of Virginia reviewed the case and held that there was "no reversible error in the judgment complained of" after undertaking a "review of the record in this case and consideration of the arguments submitted in support of and opposition to the granting of an appeal." App. to Pet. for Cert. at 1a.

3. To the extent that there was any delay in presenting the federal issues in this case to the Virginia State Courts, that resulted from the convoluted manner in which this case was handled by the Virginia trial courts, resulting in the two-tiered denial of Winchester's standing. Not until Winchester's standing had been totally denied by grant of J.N.O.V. after a jury trial and verdict against one of the Respondents—*and* after that ruling had been upheld by the Virginia court of last resort—was there a complete denial of access to the courts and Winchester's due process rights.[3] It is unreasonable to suggest that Winchester

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[2] Even Respondents concede—as they must—that Winchester's arguments "could be read" as implicating the due process and other federal issues for which certiorari is sought. Opp. at 8.

[3] It would have been inappropriate, if not disingenuous, for Winchester to assert that it had been deprived of its due process right of access to the courts before that point in time because it arguably still had access to the appellate court of the Commonwealth as an assignee of the homeowners. Once the highest state court made its decision in favor of Respondents, however, Winchester had been effectively deprived of its standing to pursue its claims further

could or should have anticipated that the Virginia Supreme Court would allow to stand rulings denying access to the courts by all parties affected by a defective product.

4. Furthermore, in seeking review of these issues by the Supreme Court of Virginia and in asking that court to grant an appeal, Winchester did indeed point out that the federal issues were not "new grounds of appeal." But rather than indicating that Winchester did not properly raise the federal issues below, as Respondents suggest, just the opposite is true. The Respondents have chosen to ignore Winchester's direct assertion that "the reversible error is so great as to violate Winchester's due process rights pursuant to . . . the 14th Amendment to the Constitution of the United States." App. to Pet. for Cert. at 40a-41a.[4] The italicized language found on page 5 of the Respondents' Brief in Opposition, which *follows* the above quotation, merely clarifies and better articulates that the denial of standing was a violation of due process.[5] Hence, Winchester has met its burden of "affirmatively" showing that the failure of the Virginia Supreme Court to expressly pass upon the federal issues presented to this Court was not due to want of proper presentation.

5. The federal issues having been raised with the Supreme Court of Virginia, this Court has the power to

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against Respondents in the Virginia courts—in its own right *and* as assignee of the homeowner.

[4] By stating that these arguments were not "new," Winchester did not mean to say—and did not say—that it was *not* raising these arguments.

[5] A careful reading of the *Herndon*, *Godchaux* and *McCorquodale* cases cited in the Respondents' Brief in Opposition reveal factual differences which make those cases distinguishable. Indeed, language in the *Herndon* case refutes Respondents' argument: "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." *Herndon v. Georgia*, 295 U.S. 441, 444 (1935).

review these claims and grant the Petition. Moreover, given the split among the Circuits and the importance of the issues raised in this Petition, the Petition should be granted.

Respectfully submitted,

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